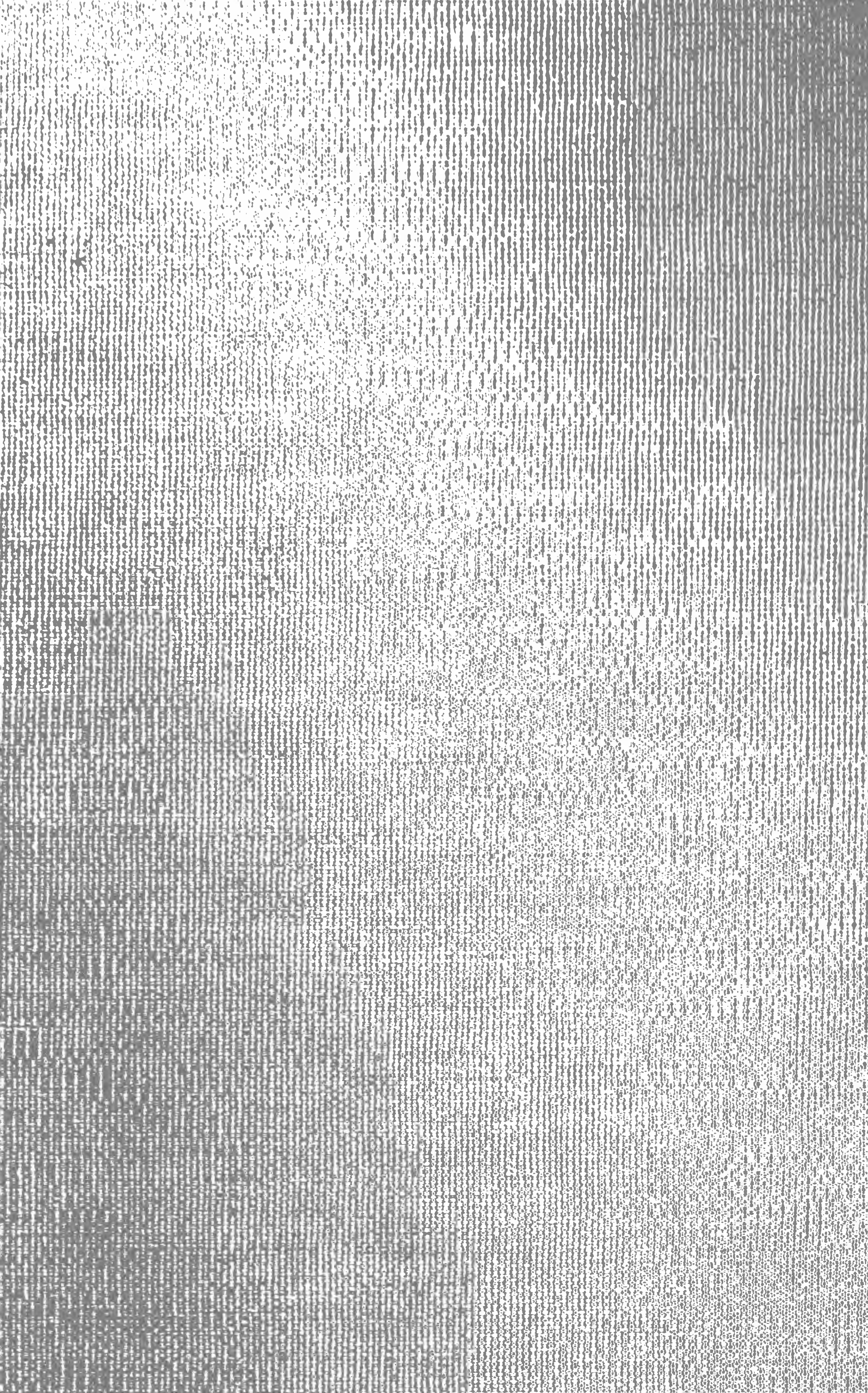

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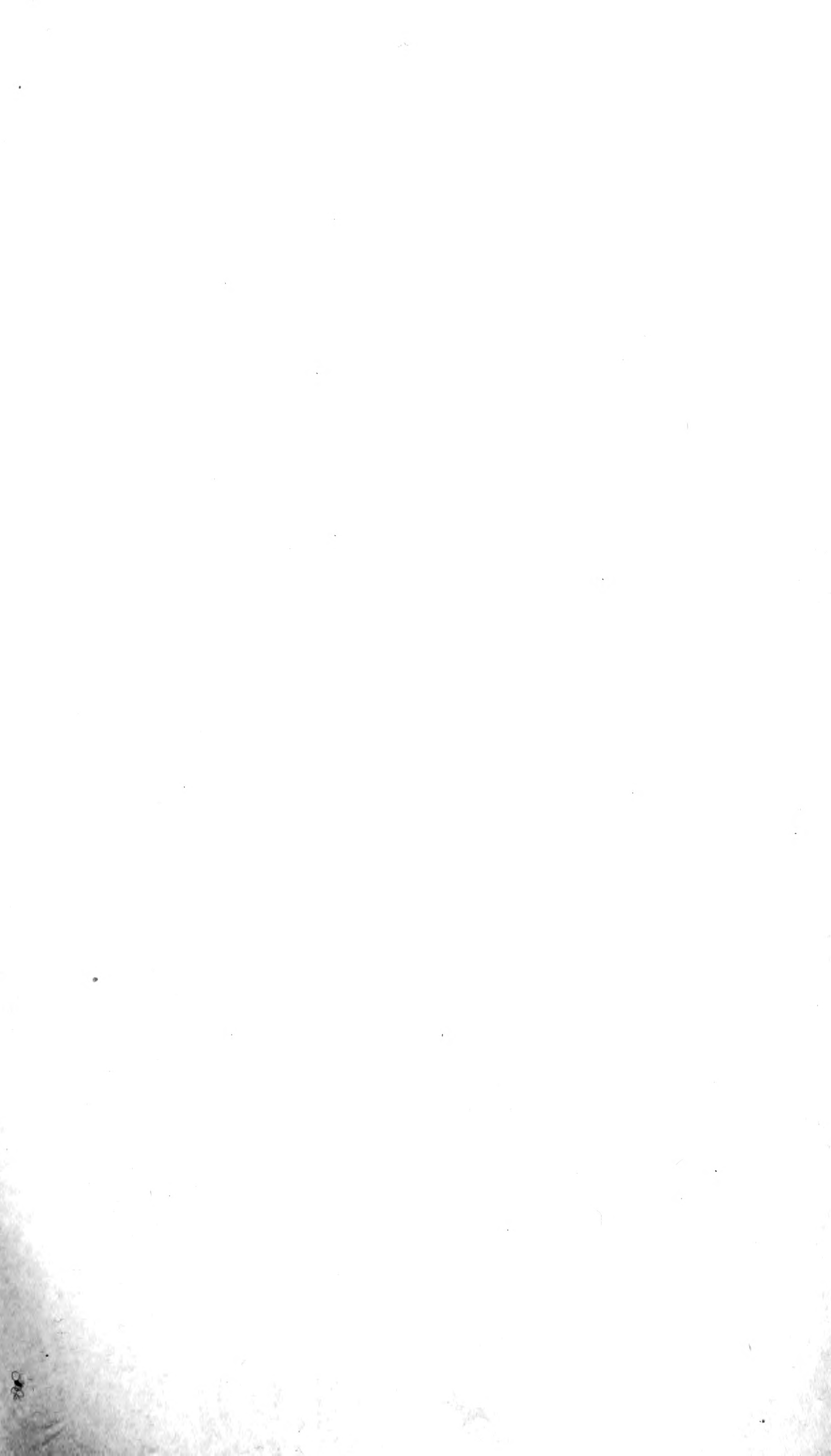

No. 16231 VOL. 3100

United States
Court of Appeals
for the Ninth Circuit

NATIVIDAD SALINAS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 305, to 633, inclusive)

Appeal from the District Court for the District of Alaska, Second Division

FILED

MAR 23 1959

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif. —3-13-59

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Appeal from the District Court for the District of Alaska, Second Division

(Testimony of Edward J. Harkabus.)

(The jury inspects G-5 and G-6 after which they are returned to the Clerk and placed with the rest of Exhibit G. The jury is then duly admonished by the Court and the case is recessed and court adjourned at approximately five o'clock p.m. until ten o'clock a.m. the following morning.)

Be It Remembered that at 10:00 a.m. on April 24, 1958, court reconvened and the trial of this cause was resumed. The defendant was personally present and represented by counsel; the plaintiff was represented by the United States Attorney.

The Court: It appears that all the jury are present.

(Both counsel stipulate as to the presence of the jury.)

The Court: We will proceed then with the examination of the witness, Mr. Harkabus, who was on the stand at the time of adjournment last evening.

Q. (By Mr. Hermann): Would you please state what all of the factors were on which you based your opinion as to the point of origin of the fire?

A. Well, as I previously testified, the point of origin was determined, based on discovery of the soldering iron casing, various rings we had here yesterday, and sawdust sample which was discovered at the point of origin which had the greatest depth of char. Generally in a point of origin its a point of it which burns the longest length of time and you have more char there. Directly above the

(Testimony of Edward J. Harkabus.)
point of origin the roof eaves were completely destroyed, [265] which further indicated this was the point of origin of the fire.

Q. Now in regard to the sawdust sample which you explained yesterday, would you state whether or not you examined any other sawdust in the attic and, if so, where?

A. I did. I sampled sawdust throughout the attic area where the fire had occurred.

Q. What, if anything, did you discover from that examination?

A. I discovered the absence of any odor like the sample I took, which had the odor of gasoline.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit J and ask you if you have ever seen it before?

A. Do you mind if I open this jar?

Q. Go ahead.

(The witness opens the jar.)

A. Yes, sir, I have seen it.

Q. Where did you first see it?

A. I saw it in the attic of the Kotzebue Grill adjacent to the point of origin of the fire.

Q. How can you determine that is the same object you saw at that time.

A. My initials are on this jar, and when this was picked up it was placed in the jar and so labeled with my initials and also initialed by the U. S. Marshal, Robert Oliver.

Q. Is there anything about the paper itself that recalls to your mind?

A. Well there is a substance on here which ap-

(Testimony of Edward J. Harkabus.)
pears to be pancake makeup to me. [266]

Q. Would you state where or not you have seen any similar substance in the Kotzebue Grill?

A. Well, not a substance in that effect. However, there was pancake makeup on the dresser in Mr. Salinas room in the Kotzebue Grill.

Q. Was the makeup in there in any way similar to the makeup on the paper?

A. Yes. It appeared to be similar.

Q. Were there any other pieces of paper in the attic?

A. Well, there were pieces of charred paper.

Q. Will you describe them.

A. Well, they were just merely charred paper, small pieces of charred paper.

Q. Are you acquainted with the defendant?

A. No, I am not.

Q. To your knowledge does any member of the National Board of Underwriters hold any insurance on the premises known as the Kotzebue Grill?

A. No, sir.

Q. Mr. Harkabus, did you formulate any opinion as to the amount in dollars of the damage the Grill had received as a result of the fire?

Mr. Taylor: Just a minute, your Honor, I am going to object to the question on the grounds this witness has not been qualified as a builder or real estate expert sufficiently to estimate damage to the building.

The Court: He testified to his experience as an appraiser sufficiently to qualify him. He may answer. [266]

(Testimony of Edward J. Harkabus.)

A. Well, I would estimate damage to the Kotzebue Grill to be in the neighborhood of $2,000.00 to $2,500.00.

Q. (By Mr. Hermann): At the time you inspected the upstairs of the Kotzebue Grill, did you notice stock? A. I did.

Q. What kind of stock did you notice?

A. In the back room there were several cases of canned goods, two of which were on the floor and are indicated by the photographs, and against the left wall I believe there were eight or nine cases, I believe. There could have been more but that is my recollection, and in a small pantryway or storeroom there were condiments and spices. I didn't inventory or check for volume.

Q. Were there any other foodstuffs, besides those which you have mentioned, in the upstairs of the Kotzebue Grill?

A. Not to my knowledge and recollection, no, sir.

Q. Did you formulate any estimate as to the market value of the Kotzebue Grill following your inspection? A. You said market value?

Mr. Taylor: Just a minute, your Honor, I am going to object on the grounds the market value would not be the true value of the place.

The Court: Well that is correct. Perhaps it is preliminary. As I understand it, the true value for insurance purposes must be the market value less depreciation. Is that correct?

A. Yes, sir. [267]

(Testimony of Edward J. Harkabus.)

The Court: So it is probably preliminary. But in order to show the market value less depreciation, first the market value must be shown.

Mr. Taylor: The reason I brought that up, your Honor, unless there is a buyer able and willing to buy and a seller who wishes to sell and desires to sell, the market value would be what was agreed upon. But I doubt whether there would be enough sales such as that in Kotzebue to establish a market value. I think your best value would be the replacement value.

The Court: Possibly your last question is right. The market value, I understand, for insurance purposes means replacement value. That is, the market value at the time of loss would be the replacement.

Mr. Hermann: That is not my understanding. I think the market value is the value the builder might be expected to sell for.

The Court: Perhaps we had better ask the witness here for sure whether it is the replacement cost or market value in the ordinary sense.

A. There are several ways of figuring it in relation to depreciated value or, as Mr. Taylor pointed out, it can be the market value. However, to save everyone's time here, I don't feel qualified to give an estimate of the market value on the place. I don't know how much the transportation costs to Kotzebue would be and the other factors involved.

Q. (By Mr. Hermann): What does market value generally mean for insurance purposes? [268]

(Testimony of Edward J. Harkabus.)

A. Well, sir, the market value would be whatever the selling price would be. If, for example, an individual purchased a property—we will take an arbitrary figure, say, of $10,000.00, he certainly wouldn't have, if he had made no improvements, he wouldn't have a greater equity than his $10,000.00.

Q. Then we would figure depreciation on the price of the building?

A. Say, for example, he could sell for $20,000.00 —but for insurance purposes it can be figured in many different ways. I am not being evasive, sir.

The Court: The market value then, is only one factor in determining replacement cost?

A. If, for example, you had several contractors to bid on it, what each of them thought in their own minds, that would be the replacement cost of the value of building.

The Court: You do not feel qualified to——

A. I make an estimate, sir, but the adjuster is the one to handle those factors.

Q. (By Mr. Hermann): Would you state generally in what type of condition you found the building as a whole at the time you made your investigation.

A. Well, the building appeared to be an old type structure and wasn't in too good condition. And I base that on the fact that the upstairs floors were cracking, on the roof joists, and the wiring was in poor shape. In fact we found pennies behind the fuses on the wiring circuits. Some of the

(Testimony of Edward J. Harkabus.)

plywood was off and it was a patchwork type of thing. I don't know how old the structure is actually, but generally I would say off-hand it was in poor condition. [269]

Mr. Hermann: I have no further questions.

Cross Examination

Q. (By Mr. Taylor): Mr. Harkabus, of the various persons that you were employed by, and especially the Association of Fire Underwriters—was that the name?

A. National Board of Fire Underwriters.

Q. National Board of Fire Underwriters, and you say that consists of 144——

A. Capital stock insurance companies, yes, sir.

Q. Your salary is paid by the National Board, is it? A. That's right.

Q. Has your training in this particular line, that you mentioned in your direct examination, has that been within the years in which you have been with the National Board? A. Yes, sir, partially.

Q. Also, I believe you said you had investigated the origin of approximately 600 fires?

A. I said several hundred—I didn't say 600.

Q. That would include many small fires in which the origin was very evident, would it not?

A. As well as many large ones, yes, sir.

Q. Then you investigate the origin of all fires, regardless of whether there is any suspicion of their being incendiary or not?

A. Well maybe I can answer this way: if I

(Testimony of Edward J. Harkabus.)
receive a request to investigate by any official agency to investigate to determine the cause, whether there are any suspicious circumstances or not, I will, yes —and whether there [270] is any insurance or not.

Q. I believe the purpose of that, Mr. Harkabus, is to have you make an examination for the benefit of the Underwriters, so if there have been any practices in that particular building causing that particular fire, it would be brought to the attention of the Board so they can promulgate rules and regulations to eliminate the possibility of fire by that source. It might be a careless practice and they would like to eliminate it.

A. That is partially true; and another factor is the elimination and suppression of arson in relation to the same matters. But you are partially right, yes.

Q. In the last four years how many arson cases have you actually been interested in, Mr. Harkabus?

A. Well, I am interested in all arson cases, Mr. Taylor.

Q. Well, that you participated in prosecuting?

A. I will have to think for a moment here. You mean the ones that went to trial—is that your point?

Q. Yes.

A. Oh, I would say, roughly, six.

Q. That is throughout the Territory of Alaska?

A. Yes, sir.

Q. Now a few questions—I believe you answered them fairly off-hand. You mentioned in regard to

(Testimony of Edward J. Harkabus.)
this soldering iron about a flash point being 495 degrees. What did you mean by that? That gasoline has that flash point?

A. No, sir. Gasoline has a flash point of minus 45 degrees.

Q. 45 degrees? [271]

A. Yes, sir. But it has an ignition temperature of 495 degrees——

Q. If it reaches 495 degrees—is that fahrenheit or centigrade? A. Fahrenheit.

Q. Also you stated that a soldering iron, such as would result if these parts fitted together and were the same soldering iron, would reach a heat between nine hundred and eighteen hundred degrees? A. Yes, sir.

Q. Fahrenheit?

A. Fahrenheit. They are capable of reaching that. Naturally the lower limit would be from zero up through that range.

Q. As I understand, Mr. Harkabus, the base or part going to make the point will be much heavier if you are doing a commercial job of soldering, such as pipe than if you do a smaller job. In a smaller job you would use a smaller point as the smaller point doesn't take as much electricity and keeps the point down to a heat just slightly more than the soldering element that you are using?

A. Would you repeat that question, please?

Q. Maybe I can illustrate it a little better than that. I believe you said that tin has a melting point or fusing point of 1100 degrees?

(Testimony of Edward J. Harkabus.)

A. That is tin as of itself, Mr. Taylor, not in combination with lead, as in solder.

Q. And lead you said has *66* degrees as a melting or fusing point? A. Yes.

Q. Then, if you had a solder, if you were using tin—if you were using a solder and doing some work, and you were using tin for solder, which [272] they do, wouldn't you have to heat your point slightly more than 1100 degrees? Very little more than 1100 degrees?

A. Well, if you had one specific type of soldering iron for each element you attempted to solder, you would have a mitt full of soldering irons.

Q. I know that. But the smaller the iron the less heat it will give out—it won't hold the heat as good?

A. Well I would say generally that would be true, yes.

Q. So then I believe the usual soldering compound is a mixture of tin and lead, is it not?

A. Yes.

Q. Do you know what the melting or fusing heat is for an ordinary soldering mixture?

A. Not off-hand, no, sir.

Q. Could it be five hundred and some degrees?

A. It could be.

Q. So you would want your soldering iron to be slightly more than that?

A. It would be dependent on the precentage of tin vs. the percentage of lead in the mixture you have there. I mean the melting point of lead itself

(Testimony of Edward J. Harkabus.)
is 660 and with a combination of tin it would undoubtedly be higher than 500.

Q. Then some elements—would you tell us, if you know, if there could result a combination of elements at which the fusing point might be lower?

A. It's possible.

Q. Now I don't believe you testified, did you, Mr. Harkabus, as to how long it would take if that soldering iron were put in the sawdust, that [273] it would take to ignite the sawdust to cause the fire such as occurred in the Kotzebue Grill?

A. No, I don't believe I testified as to that.

Q. You made no test as to that?

A. No, sir.

Mr. Taylor: Now may I see those pictures, please. The last bunch that was put in—the large ones.

Q. Now Mr. Harkabus, I hand you plaintiff's Exhibit 4, G-4, and ask you to point out on that exhibit, if it is on there, the point of origin of the fire.

A. G-4. In the upper left-hand corner you can see a portion of the trapdoor, but it doesn't give a wide enough angle here to point it out specifically. It would be on this edge, right approximately in here, sir (indicating).

Q. Maybe we can do better with one of these other exhibits. Mr. Harkabus, I will hand you then Exhibit G-7 and ask you if that would be better for illustrating the point of origin?

A. G-7. The point of origin is almost directly

(Testimony of Edward J. Harkabus.)
in front of this mysterious hand pointing out of the loft structure here, almost directly below that adjacent to the roof joists, the ceiling joists.

Q. Thank you. That would be practically under this hand. This is a trap door then, that is an opening into the attic?

A. That is the opening into the attic, yes.

Q. Now let's clear up—first let's clear up this mystery. Who does the mysterious hand belong to?

A. Deputy Marshal Adirim. [274]

Q. I thought I recognized it. Now, having the exhibit in mind, Mr. Harkabus, how can you reconcile your statement and the fact that all those other papers were consumed in the attic and that this paper was found intact in the attic and shows no sign of charring, no sign of burning or no sign of having been in contact with the fire whatever?

A. I wouldn't say it shows no sign of contact.

Q. Did you use a magnifying glass?

A. I don't need it, Mr. Taylor. If you will bear with me—this is the point of origin here—(indicating); the paper was found just a little bit to the left of it. You are asking for an opinion now, aren't you?

Q. I am asking how you reconcile the fact of the extent of damage and saying that this was found near the point of origin of the fire, which you say was the hottest part of the fire; and you say this shows no charring and no appreciable change from the condition it was in when put up there?

(Testimony of Edward J. Harkabus.)

A. Well, sir, it could have been under sawdust, because the char pattern in this area, with the exception of the point of origin, was not charred to the depth of the plywood ceiling. So if this paper had been under the sawdust or completely covered by it, the fire would have traveled over the sawdust portion and this would not have fire damage.

Q. Now isn't it the intent of your testimony, Mr. Harkabus, to show that that particular exhibit was taken from a room on the second floor of the Kotzebue Grill at or before the time of the fire?

A. The intent of my testimony, Mr. Taylor, is to tell the truth.

Q. Do you believe that that was in the attic at the time of the fire?

A. I believe it could have been, yes, sir. [275]

Q. Can you explain to the jury why it would not have been in the fire or close to a fire such as existed in that attic?

A. I think I have answered that.

Q. You say somebody buried it——

A. I know what I found there.

Q. ——That would be a little far-fetched conclusion, wouldn't it?

A. Not in my mind, Mr. Taylor, because the sawdust at the lower level was not charred at all, as evidenced by this pile over here which shows no char at all (indicating).

Q. Where was the papers that you found up there that was charred? Where did you find those?

A. This paper here, if you take the hand. This

(Testimony of Edward J. Harkabus.)

is Exhibit G-7. That is the point at which this paper was found over here (indicating), further away from the point of origin than the point where the charred paper was found. The actual point of origin would, in my opinion, be approximately five inches in diameter and four inches deep.

Q. The char pattern?

A. Not the char pattern, the char itself, sir.

Q. That is the sawdust would be about that?

A. Yes, sir.

Q. Now this could have been taken up there the night of the fire, after the fire was put out, couldn't it? A. It could have been.

Q. Somebody could have grabbed a piece of this paper toweling for wiping their hands? [276]

A. It's a paper towel.

Q. Mr. Harkabus, are you familiar with the type of generation of electric heat by induction?

A. Yes, sir.

Q. Will you explain to the jury as briefly as possible how heat by induction is brought about.

A. Well, it is comparable to a coil, and I think most people are familiar with what a coil is. Are you talking about heat in relationship to wiring? The relationship of heat in wiring——

Q. Yes.

A. The three major causes of electric fires, one being arcing, and another would be dead shorts, where you have the generation of heat where resistance is built up in an electric circuit to the point where it acts as a coil and causes heat. It's also very common in BX wiring.

(Testimony of Edward J. Harkabus.)

Q. Would that be where there is two wires in BX, might it have one system that would go into a BX and if there was a reason for this electricity continuing to flow against it, would it get that wire inside hot if the electricity was only flowing in one wire?

A. Well, if two wires were shorted, or you had a dead short anywhere along the line, it would generate heat because the circuit is broken and it is heating up the BX cable as well as the electric wire.

Q. The wire inside gets hot first, does it?

A. Yes, sir.

Q. If it got hot enough it will burn the insulation? A. It will. [277]

Q. Then the BX?

A. Not necessarily. At that point it might move back to your power source.

Q. Might there be someplace on the BX where it might build up a heat sufficient to cause a fire?

A. Yes, sir.

Q. Now isn't it evident on this exhibit Number—I am not familiar with this system——

Clerk of Court: L.

Q. ——Does not this Exhibit L—examine that, please, and see if any place on it that shows where it has been subjected to considerable heat?

A. It has been subjected to heat; there is no question about that.

Q. And calling your attention, Mr. Harkabus,

(Testimony of Edward J. Harkabus.)

to one particular point here, does not that indicate the insulation inside has boiled out through that BX, been subjected to greater heat at that point than others?

A. I wouldn't say that, sir, no. This heat here as evidenced on this BX could be caused from the fire itself; I mean, are you indicating this is caused from a short circuit? I am trying to answer your question honestly.

Q. I am not indicating anything; I am trying to get at the truth.

A. This doesn't indicate to me a greater degree of heat than anywhere along the circuit on this BX, no. If there was an arcing there would be.

Q. That is what I say: could there possibly be an arcing at that particular point?

A. We can take it apart and find out.

Q. Does not that show there has been some substance that has melted [278] or evidently come there from an exterior source?

A. It's possible.

Q. Mr. Harkabus, did you take the samples of the sawdust? A. Yes, sir.

Q. Was that on the 30th day of December, 1957?

A. Yes, sir, it was.

Q. In your training as an FBI agent and also your training for your present work for the National Association of Underwriters, have you had occasion to ascertain the odors of various inflammable liquids, whether they will cling to sawdust or other fabrics or any other substances?

(Testimony of Edward J. Harkabus.)

A. That is a pretty wide question. Do you mean all the range of volatile liquids?

Q. Gas, blazo, kerozene, I think, which are possibly the three most used.

A. Well, let me answer this way, Mr. Taylor: The evaporation of any liquid volatile would be dependent on temperature factors beyond that point at which natural vapors are given off. That temperature would depend on the condition of the weather, humidity and other factors, so I am afraid I couldn't answer your question.

Q. Well let me ask you just one question in regard to sawdust. In regard to the sawdust, how long would it be in an attic subjected to an intense degre of heat by reason of a fire which lasted for perhaps one hour?

A. I'm afraid I don't understand. What was the question, sir? What was the question?

Q. I asked you how long, do you know how long it would take for the evaporation of that gasoline, kerosene or blazo that might be used in causing [279] that fire?

A. In liquid volatiles, generally they sink to the lowest point at whatever place they have saturated, and many times you will find that flammable liquids, which are liquids below 200 degrees fahrenheit, with a flash point below 200 degrees fahrenheit, some of them will evaporate more rapidly than others, like ether, for example, as against paint thinner. And in many instances even though sawdust or wood has been subjected to intense degrees

(Testimony of Edward J. Harkabus.)

of heat, it is possible to check the lowest point, which would be your point of origin, generally, and find remnants of the volatile that had been used. Does that answer your question, sir?

Q. You answered one point, except there is one point I wanted to get. How long would that remnant remain in that sawdust? So that it could be detectable by a sense of smell?

A. Well, I can't answer that question as to how long it would remain, but sawdust, if it is utilized as an insulation barrier also burns over a wide area like, for example, a catalog will. If you note books involved in fires, they are compressed, and the sawdust in this instance had water thrown on top of it, and the area where we found the sawdust which emitted an odor similar to gasoline, had about a half inch of water adhering to it. I mean the sawdust was frozen together.

Q. How long after the fire had that frozen?

A. Well, sir, the fire occurred on the 25th; I found the sample on the 30th day of December.

Q. And you think, then, that smell of that gasoline then, or blazo or kerosene or ether would have lingered in that sawdust during that time? [280]

A. I do.

Q. Now would you smell this, Mr. Harkabus, and I will ask you if you can detect at this time the smell of gasoline, kerosene or blazo or ether?

A. Well, I smelled it yesterday and detected an odor of gasoline at that time. As I testified, when we placed the sample in that jar, that was four months ago.

(Testimony of Edward J. Harkabus.)

Q. And you have had that in a sealed jar with a rubber seal, have you not? A. Yes, sir.

Q. Now after smelling that this morning, Mr. Harkabus, is that not more the smell of crude oil than gasoline? A. Not in my opinion, no.

Q. Now, Mr. Harkabus, you have indicated quite a knowledge of electronics, not electronics, but electric systems, and I am going to ask you if you will examine that cord and tell me if that cord would be suitable for a connection from a plug to a soldering iron.

The Court: The exhibit number, counsel?

Q. Exhibit H.

A. You say from a plug—do you mean an outlet?

Q. That you would plug into the line?

A. With this small end of the plug?

Q. Yes.

A. I would say it would be.

Q. You think it would be heavy enough to carry a load to heat a soldering iron? [281]

A. Yes, sir.

Q. Now, Mr. Harkabus, I believe to be effective, that is as an instrument for starting a fire, this item Number I and this E would necessarily have to be merged together into one instrument, would they not?

A. Well, let me put it to you this way: you have a heating element, a coil, and it wouldn't necessarily have to be merged into one instrument to generate heat, but if you were using it for soldering it would.

(Testimony of Edward J. Harkabus.)

Q. It would not be a very effective instrument if they were not both together.

A. Let me see the one element, please.

(One of the exhibits is handed to the witness.)

A. This connection here, Mr. Taylor, (indicating), if it were hooked up to here (indicating), should generate heat. The grooves give transmitted heat to the point of your soldering here (indicating). It is transmitted through this coil, which is all this amounts to, to the point of your soldering.

Q. But to get that soldering iron to send out this 900 to 1800 degrees we have here, it would necessarily have to be in here?

A. If you wanted to utilize it as a soldering iron, yes.

Q. You did not see them assembled at any time?

A. I never did, no.

Q. Now, Mr. Harkabus, would you examine both of these and state in your opinion, whether either one of those has been through a fire?

The Court: That is Exhibit E and Exhibit I you are talking about? [282]

Mr. Taylor: Yes, sir.

A. This definitely has. This is Exhibit I. Because the wires indicate a high degree of heat on the brass section, and the wires are melted off and it is soldered on to the little screws here (indicating).

Q. Well, if there was a high degree of heat on that isn't it a fact that solder would melt?

(Testimony of Edward J. Harkabus.)

A. Well, the end of the wire is gone from there.

Q. These are the ends, are they not?

A. This is a small piece of wire adhering to the screw, if you will notice.

Q. But the solder has not melted then?

A. Well, it could have melted and rehardened. I don't know. I don't know that, sir.

Q. Well, isn't it a fact that when a thing laying there gets hot enough, solder will run away from the point in which it has melted, by the gravity itself of the solder, which is high? You have a high gravity.

A. Gravity is the same throughout the earth.

Q. Well, you have a specific gravity of solder which is much greater, much heavier, than the specific gravity of water or air?

A. I don't believe you could say it would run away; if it were melted in a flat position on a horizontal basis and doused with water it would reharden, in the same place.

Q. Well, heat reduces solder to a liquid, does it not? And liquid seeks its own level, does it not?

A. Yes. [283]

Q. Very doubtful whether that solder would remain on those set screws, would it?

A. It's a matter of conjecture, Mr. Taylor.

Q. It would be conjecture, yes. In the ordinary use of a soldering iron, where it was used, it would show some signs of heat around these connections just the same as this shows some signs of heat?

A. Probably.

(Testimony of Edward J. Harkabus.)

Q. I am just going to ask you one or two more questions, Mr. Harkabus, and that is the appraisal of property for the purpose of insurance—when an insurance agent insures property he insures on its present value, does he not?

A. Well, sir, I am not an insurance agent; I am an arson investigator. The only appraisals I make are in relationship to the amount of damage to the premises.

Q. In your work though, do you have occasion to talk with the insurance people who actually write the insurance? A. Yes, sir.

Q. As to how they arrive at the evaluation of certain property?

A. Well, you can arrive at it from many standpoints; one is the depreciated value, which would be the purchase price less depreciation; another would be the fair market value; and another would be the replacement cost.

Q. Now if a person went to an insurance agent and asked him to examine—Well, perhaps the best way to illustrate the question is to say I bought a piece of property with a building, and that the building upon it was worth $20,000.00. I bought it for $10,000.00 but there would be nothing wrong for me to insure that for $20,000.00, would there, if the actual value was $20,000.00. [284]

A. If the actual value was $20,000.00 there would be nothing wrong.

Q. Did you look any place other than the Kotzebue Grill in regard to restaurant stock that was on hand?

(Testimony of Edward J. Harkabus.)

A. I did not, no. I didn't know there was any other stock.

Q. That's all, Mr. Harkabus.

Redirect Examination

Q. (By Mr. Hermann): Mr. Harkabus, I hand you plaintiff's Exhibit E and Exhibit I and ask you, if you know, what would keep the element inside the case of the soldering iron, normally?

A. Normally there would be a wood handle. Otherwise you would get a shock every time you used it, or your hand would get heated up by grabbing the metallic portion of the soldering iron.

Q. Now calling your attention to the casing, Exhibit E, to some discoloration on it, do you have any explanation as to what would cause such a discoloration?

A. Well, I would say it probably was involved in a fire. However, there are instances when you do get a discoloration on a piece of Chrome metal when it is used in the normal course of soldering, but it would usually be down in the lower section. This could be caused from a possible short in the iron but this appears to me to have been in a fire, I think. I don't actually know, but I know the element has been.

Q. Could you tell us whether or not it would be likely for the iron to short if the handle and cord were burned? A. Yes sir.

Q. What would be the normal color of a new iron of that nature? [285]

(Testimony of Edward J. Harkabus.)

A. It should be rather shiny because it has a chrome finish on it.

Q. Could you state whether or not a substance of crude oil would eventually evaporate?

A. Over a period of time it probably would, but the same answer I gave Mr. Taylor — crude oil would not be as volatile as gasoline or ether or other flammable liquids.

Q. But eventually would it evaporate?

A. Well, it probably would, but I mean it would depend on factors of humidity, temperature and other factors, so it would be impossible to answer that. The sawdust that we found—well, I have answered your question.

Q. Was there any indication of what element was first to catch on fire in that attic, that you noticed?

A. Well, I will have to go back to my reference point, which is the point of origin, and the fire initiated in that area and traveled upward until it hit the eaves, and rolled around the roof.

Q. Let me put it this way: in relationship to the sawdust and wood was there any indication of what article was the first to catch on fire in that attic?

A. That would be very difficult to say because the ignition temperature of paper, sawdust and wood are very close and I couldn't say in what order the fire did occur actually. Probably paper would kick off before the rest of it and gasoline would kick off before paper.

(Testimony of Edward J. Harkabus.)

Recross Examination

Q. (By Mr. Taylor): Just two questions and I think I can finish. Mr. Harkabus, do you know what the ignition point of dry sawdust is? [286]

A. The ignition point of sawdust is 450 degrees.

Q. Now this sawdust in the bottle is not burned sawdust is it? Just charred?

A. Well, it is burned on the surface. As I testified, sawdust has a tendency to burn like a large catalog if it is packed down.

Q. Well, the entire mass doesn't catch fire, does it?

A. It would generally be over the surface of it, unless it has a low point.

Q. Well, would it be a charring more than anything else?

A. Well, the top of it will be charred yes, if that answers your question.

Q. Now Mr. Hermann was asking you about crude oil such as fuel oil. Isn't it a fact Mr. Harkabus that crude oil contains certain tars that if they get on to something those tars are deposited although the oil itself might go away, and those tars will remain there and have an odor for many, many years? A. Well, I don't know, Mr. Taylor.

Q. Are you familiar with the tar pits in La Brea in Los Angeles?

A. I have heard and read of them, yes.

Q. Have you been out there? A. No.

Q. You don't know that the odor of that oil that

(Testimony of Edward J. Harkabus.)
deposits those tars there is still on those deposits?

A. No sir.

(There were no further questions and the witness was excused from the stand.) [287]

Mr. Taylor: May we have a recess at this time, your Honor.

(Thereupon at approximately 11:00 a.m. court was recessed for ten minutes, the jury being first duly admonished by the Court.)

After Recess

(Both counsel stipulated as to the presence of the jury, and all other necessary persons being again present, court reconvened and the trial of this cause was resumed.)

CHARLIE WILSON

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name, Mr. Wilson?

A. Charlie B. Wilson.

Q. Where do you live, Mr. Wilson?

A. Kotzebue.

Q. How long have you lived in Kotzebue?

A. Well, since I remember.

Q. How were you employed in December of 1957? A. How I were employed?

Q. What kind of job did you have?

(Testimony of Charlie Wilson.)

A. I was working for Steve about the first part of December.

Q. Starting in the first part of December?

A. Yes. [288]

Q. How long did you work for him?

A. Well about—I don't know. About two weeks I guess, maybe less. I don't quite remember.

Q. What kind of a job did you have? What kind of work? A. Mostly cleaning up.

Q. Were you at the Grill on the night of December 25? A. After the fire I was there.

Q. What time did you get there about?

A. After the fire.

Q. Was the fire out when you arrived?

A. Yes.

Q. Were people fighting the fire?

A. Yes, they were.

Q. What was the first thing you saw when you got there? A. When I first got there?

Q. Yes.

A. Before I went in I see flames going out of the room.

Q. What did you do after that?

A. I was going upstairs, but I don't go clear upstairs, to go back downstairs.

Q. What did you do after you went back downstairs? A. I was watching the cash register.

Q. Do you recall whether or not you saw Joe Brantley at the fire? A. Yes.

Q. Where did you first see him? [289]

A. Halfway from the place to the restaurant.

(Testimony of Charlie Wilson.)

Q. Where did he go from there, that you saw?

A. Well, we went down to the Grill together.

Q. What did he do when you got to the Grill?

A. He opened the outside door.

Q. Which door would that be?

A. Toward Fergusons. The side door.

Q. Is that on the bottom floor or the second floor? A. The bottom floor.

Q. What does that door open into? What part of the Grill? A. The kitchen.

Q. Did you go in with him? A. Yes.

Q. What did he do in the kitchen?

A. He got the key for the upstairs and opened the upstairs.

Q. What did you do at that time?

A. While they were putting the fire out I was downstairs all the time.

Q. While you were downstairs?

A. Well, I was watching the cash register.

Q. Would you state whether or not you were asked to watch the cash register? A. Yes.

Q. Who asked you to? A. Steve.

Q. What did he say when he asked you to? [290]

A. He just wanted me to watch the cash register. That's all.

Q. Where did you meet Steve at?

A. Right by the steps I met him.

Q. Do you recall exactly what he said to you?

A. That's all he said to me. I just met him there. A lot of boys were around and he said he wanted me to watch the cash register.

(Testimony of Charlie Wilson.)

Q. I see. How long did you stay down there with the cash register?

A. Well, until the fire was out.

Q. Now do you know whether or not there was any blazo in the Grill before the fire?

A. Yes. There was one upstairs.

Q. Whereabouts upstairs?

A. In the back room.

Q. Do you know who put it there?

A. I put it there, myself.

Q. Would you explain how you happened to put it there.

A. Well, I brought it down from Rotmans and I bring it upstairs.

Q. What do you mean you brought it from Rotmans? From the store or hotel or where?

A. From the hotel.

Q. Whereabouts in the hotel? A. Room 7.

Q. Whose room was room 7 in the hotel?

A. I think it was Steve's room.

Q. How did you happen to go to Room 7? [291]

A. He told me where to get it and told me where the Blazo was and told me to bring it down to this room.

Q. Did he tell you to put it in the room, the back room upstairs? A. Yes, upstairs.

Q. When was it he told you to get the Blazo and put it up there?

A. That was the day before the fire because I was using gas all the time myself.

Q. Do you know how much gas was in the can just before the fire.

(Testimony of Charlie Wilson.)

A. A little more than half, I guess, the last time I used it.

Q. What was that Blazo usually used for?

A. Blow torch. I used it for the blow torch all the time.

Q. When was the last time you used that can?

A. I used it every day. I used it on the 24th.

Q. When was the last day you used it before the fire? A. Before the fire?

Q. Yes. A. The 26th.

Q. Is that when it was over half full at that time? A. Yes.

Q. Now before you put the can in that room, where was the Blazo generally kept before then?

A. Well I usually put it right in the corner, on the right side, on this side (indicating).

Q. Before you put it in the room was any Blazo kept anywhere else?

A. Oh yes. There was one Blazo can—the Blazo was kept where they [292] kept the ice in the back shed downstairs.

Q. How many times during the fire did you see Mr. Salinas? A. During the fire?

Q. Yes.

A. Well, I seen him about two or three times downstairs.

Q. Would you describe how he acted when you saw him?

A. He was all right. I mean he didn't——

Q. Was there any indication that he was excited?

(Testimony of Charlie Wilson.)

Mr. Crane: Objected to, your Honor, as being leading and suggestive and putting the answer in the witness' mouth. This witness is intelligent and can answer those questions.

The Court: Well, it is somewhat leading, but an effort to draw out the witness on a particular inquiry, along a particular line, and is explanatory. I do not think the objection applies, so he may answer.

A. What was the question again?

(The reporter then reads the previous question as follows: "Q. Was there any indication that he was excited?")

A. No. He wasn't excited.

Q. (By Mr. Hermann): Now during the time you were employed by the Kotzebue Grill did you ever clean up the upstairs of the Grill?

A. I cleaned it up every night.

Q. What was the front room of the upstairs used for? [293]

A. Well, paper work, and sometimes the girls ironed there. They do cleaning there like washing clothes and everything.

Q. What room or rooms were next to that front room as you go back?

A. What rooms were next to that front room?

Q. Yes.

A. There was a room, different room or something next to it on the right side.

Q. Have you been in that room? A. Yes.

Q. How was it furnished?

(Testimony of Charlie Wilson.)

A. Well, there is beds, a stand,—well, I don't quite remember what was in there. But there was beds, about one bed I think.

Q. Do you recall whether or not there was any clothing in that room?

A. Well, there was—I don't know whose clothes were in it—but hanging in there, there was clothes in there.

Q. What kind of clothes?

A. Men's clothes.

Q. Were they dress clothes, work clothes or what kind of clothes?

A. Dress clothes and work, something like that.

Q. Whose room was that?

A. I don't know whose room that was. Nobody was staying there.

Q. Across from that room what kind of room was there? A. Across from this same room?

Q. Across the hall. A. Steve's room. [294]

Q. How was that room furnished?

A. It's got a big bed, drawers. Two drawers on each, both sides, a mirror and a little closet.

Q. Have you seen the inside of the closet?

A. Well, it's open, no door to it. The shoes are there.

Q. Pardon? A. His shoes are kept there.

Q. Anything else kept there?

A. I don't think so.

Q. Any clothing there? A. No.

Q. Were any other things in that room?

A. There was three drawers.

(Testimony of Charlie Wilson.)

Q. Three drawers?

A. Yes. Two right alongside, and one right by his bed.

Q. Have you ever seen Mr. Salinas in that room? A. Often, yes.

Q. What would he use the room for?

A. Sometimes he stays there. Sometimes while I am working he would be in there laying down or something.

Cross Examination

Q. (By Mr. Crane): Charlie, what were your usual working hours there for Steve? I mean about what time of evening would you go to work and what time would you leave?

A. Well I come there about seven and I get out between, sometimes I [295] get out at 9:30, when I get out early. Sometimes I get out at 11:00.

Q. In other words, what you would do would be to come in about the closing time of the restaurant and then you would take over and clean up?

A. One hour ahead of time.

Q. Charlie, when you left then, would you usually be the last one to leave the restaurant?

A. Yes.

Q. And you would lock the place up as you left?

A. Yes.

Q. All right. You were employed there all during December?

A. Well, not all during December. It was about two weeks I guess.

Q. Well, whatever it was. A. Yes.

(Testimony of Charlie Wilson.)

Q. While you were employed there was anybody sleeping there anywhere upstairs at night?

A. No. I don't think anybody was sleeping there.

Q. Then none of the rooms were occupied upstairs? A. Well——

Q. Charlie, you spoke about paper work in the front room. You mean the front room facing Kotzebue Sound where they used it as an office?

A. Yes.

Q. If you know, who did the paper work in there? Who did Steve's paper work in there?

A. Percy Ipalook.

Q. Would he at times be working in there when you were there?

A. He would be working sometimes. [296]

Q. Percy Ipalook would come down there and work nights in the front office? A. Yes.

Q. Did he have any particular time to come or any time to leave as far as you know?

A. Well, as soon as he quits working for the school he goes down there and works.

Q. Would Percy sometimes lock up the place after he left the upstairs or would you always lock it up. A. I always locked up.

Q. In other words, you would wait until after Percy was through? A. Yes.

Q. Now this back room, Charlie, where the fire occurred, that room was used as a general storeroom, was it not?

A. Yes. Right in front of it—I mean between——

(Testimony of Charlie Wilson.)

Q. Where did you keep your blow torch? Upstairs in that room? A. No. Downstairs.

Q. But you stored your Blazo up in the storage room? A. Yes.

Q. Was some canned goods and stuff stored there too? A. Yes.

Q. And was there some sacks of dry groceries, commodities like beans, sugar and stuff like that up there?

A. No. I didn't see anything like that up there.

Q. Not in the back room. Was there a bunch of canned goods in the front room? [297]

A. Yes.

Q. Where else around the building was stuff stored? In the back warehouse?

A. In the front room and back room, and there is a little place between about so wide (indicating) with some dry goods. There were food shelves.

Q. There was a bunch of food stored downstairs too, wasn't there? A. Yes.

Q. Now, Charlie, coming back to the night of the fire; Steve told you to watch the cash register. That was while he was helping them fight the fire?

A. Yes.

Q. Steve was helping put out the fire?

A. Yes.

Q. Now I will ask you this: I will ask you first a preliminary question. Did you observe more or less intoxicated people around there that night?

A. Yes, there were.

Q. Now isn't it a fact that you had a good deal

(Testimony of Charlie Wilson.)

of trouble in fighting the fire because of drunks running in and out of the building getting in the way?

A. There was a couple I think. They come and go and come and go like that. They weren't doing much; they weren't fighting much.

Q. Was there anybody there to take charge and keep order at that time?

A. Except the boys that were fighting the fire.

Q. Just the boys that were there? A. Yes.

Q. I think you said something—I don't know whether you mentioned it or not—did you mention something about Charlie Norton—I don't know [298] whether you did or not.

The Court: No, he did not.

Q. (By Mr. Crane): Do you know when Charlie Norton left Kotzebue? About when?

A. Well, I think—I don't know about Charlie Norton, but I heard he was at Anchorage.

Q. Well, I will put it this way: Charlie Norton had left before you started to work for Steve, is that correct? A. Yes.

Q. Then all the time you worked for Steve Salinas, nobody occupied the upstairs? A. No.

Q. I will ask you one question: did I understand you to say that upstairs in the storeroom is where you usually kept the Blazo for your blow torch?

A. What do you mean by that?

Q. You used this blow torch all the time. Was this back storeroom upstairs the usual place to keep the supply of Blazo for the blow torch, was it?

(Testimony of Charlie Wilson.)

A. Yes.

Q. That's all.

Redirect Examination

Q. (By Mr. Hermann): During the fire did you at any time go upstairs in the Grill?

A. During the fire?

Q. Yes. A. Yes. [299]

Q. You went upstairs?

A. Yes. I went upstairs about two or three times while they were fighting the fire.

Q. Did you fight the fire yourself?

A. No, I didn't. I didn't do a thing. I was downstairs all the time while they were fighting the fire.

Q. You were downstairs all the time?

A. Yes.

(There were no further questions and the witness was excused from the stand.)

NANNIE COLSON

is called and sworn as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name, Mrs. Colson.

A. Nannie Howarth Colson.

Q. Your last name now is Colson, is that right?

A. Colson.

Q. Nannie Howarth Colson? A. Yes.

Q. Are you over 21 years of age? A. Yes.

Q. Where do you live?

A. I am staying over at Fred's now. [300]

(Testimony of Nannie Colson.)

Q. Where do you ordinarily live?

A. Kotzebue.

Q. Do you have a job at Kotzebue?

A. Yes.

Q. What is your job?

A. I work in the restaurant.

Q. Which restaurant? A. Fergusons.

Q. Where is Ferguson's Restaurant in relation to the Kotzebue Grill? A. Right next door.

Q. Were you working there on December 25?

A. Yes.

Q. How long did you stay working there that night?

A. Oh, I worked late. I come about 11:00 in the morning and get off eight at night.

Q. Pardon?

A. I come on about 11:00 in the morning and get off at 8:00.

Q. Were you working the evening of December 25? A. Yes.

Q. When did you quit work that night?

A. I don't know. After they got done with the fire.

Q. What was the first you knew of the fire?

A. Well, I was mopping the floor and somebody came in and said there was a fire.

Q. Do you recall who it was? [301]

A. No. Everybody was all out.

Q. Pardon.

A. Everybody was all out of Archie's. I was the last one to leave there.

(Testimony of Nannie Colson.)

Q. By Archie you mean Archie Ferguson?

A. Yes.

Q. Is he the owner of Ferguson's restaurant?

A. Yes. He is in Seattle right now.

Q. What did you do after that, after you heard about the fire?

A. Well, I just put my mopstick down and ran out and go on the side of the building.

Q. What did you do?

A. I asked somebody if they seen Steve, and I went over to the hotel.

Q. Do you know what time it was when you went over to the hotel? A. No.

Q. What did you do when you got to the hotel?

A. I opened the door and said "Steve, your place is on fire."

Q. Where was Steve when you did this?

A. I ran upstairs and stood by the door and said "Your place is on fire." He was standing by the hallway.

Q. How far down the hallway?

A. Near the door where it says "private."

Q. Pardon?

A. Near the door where it says "private."

Q. Where it says "private"?

A. Yes. [302]

Q. How far is that from the head of the stairs, about? A. Quite a ways down.

Q. What is in between there?

A. They have rooms all the way down that way.

Q. What was Steve doing there?

(Testimony of Nannie Colson.)

A. He was—I saw him standing down there.

Q. What was he doing standing there?

A. He had his coat on and, I don't know, his gloves in his hand, I guess.

Q. Do you recall what else he was wearing?

A. No. He had a dark brown jacket on.

Q. Do you recall what he had on his feet?

A. That I can't say much.

Q. What did he do when you told him the place was on fire?

A. He went down the hall, and I told him to hurry up.

Q. Did he hurry up?

A. He walked down, and then I ran downstairs and opened the door.

Q. What did you do then?

A. After we got out, there was Bunny Rotman and Howard Monroe and then they went down.

Q. Did you go down to the fire then yourself?

A. I went down, and then I went back to work.

Q. Were you with Steve when he went to the fire?

A. No. I was walking back with Bunny.

Q. Could you see Steve on his way to the fire?

A. Yes. We saw him going down. [303]

Q. Was he running?

A. They run and then they would walk.

Q. Did Steve say anything up in the hotel when you told him the place was on fire?

A. I don't know. I don't remember.

(Testimony of Nannie Colson.)

Q. Now this place which says "private" on it in the hotel, have you ever been in that place?

A. On down at the other end.

Q. Is this Rotman's Hotel that we are talking about?

A. Yes. I have been in the kitchen and living room.

Q. What kind of a place is that?

A. A nice place.

Q. Is it an apartment or what?

A. They have a living room and kitchen—that's all I have seen of it.

Q. Now do you know whether or not there were any lights on in the living room?

A. As I was coming towards the fire I saw a room—I don't remember which one it is—but there was a light on in one of the rooms further on on this side (indicating).

Q. Was it in the living room?

A. No, one of the rooms I guess people rent.

Q. Were any other lights on? A. No.

Q. Did you see anyone else in the hotel when you went to get Steve? A. No. [304]

Q. Now, have you ever worked for Mr. Salinas?

A. Yes, I have.

Q. What kind of work did you do for him?

A. I used to work downstairs in the afternoon, and in the afternoon I worked upstairs and cleaned up his rooms and do laundry and ironing for him.

Q. Where was his room?

(Testimony of Nannie Colson.)

A. From the big room it's on this side of the place (indicating).

Q. What kind of work would you do in cleaning that room?

A. Mopping the floor and making the bed and sometimes straighten his drawers out.

Q. What months was it you worked for him?

A. It was in about November and part of December.

Q. Do you recall whether or not you ever made the bed in December? A. Yes.

Q. Did you ever make Mr. Salinas' bed there?

A. Yes sir. You see I worked in the morning and once in a while I go up in the morning and then I go to work at Archie's.

Q. How was this room furnished?

A. It's got a bed, got a closet and two drawers.

Q. Do you know whether or not there was anything in the closet in December? A. No.

Q. Do you know whether or not there was before then? A. Just his clothes.

Q. That's what I mean. What was in there?

A. Let's see—he had shirts and suits—dress pants and shoes.

Q. Do you know whether they were in that room in December?

A. Yes. He had some of them there.

Q. You stated you did washing and ironing?

A. Yes.

Q. Did that include Mr. Salinas' personal laundry? A. Yes.

(Testimony of Nannie Colson.)

Q. What would you do with his shirts and things like that?

A. After I wash them, I starch them and iron them, and then hang them in the closet. Sometimes I leave them in the front room.

Q. Now were there any other living rooms in that place?

A. No. They just have that one big room that's all.

Q. What was across the hall from Mr. Salinas' room?

A. Oh. That used to be Charlie's room, across the hall.

Q. Where is Charlie? Do you know where he is?

A. He is in the hospital.

Q. Do you know when he went to the hospital?

A. I don't remember.

Q. Well, when was the last time you were in that room? A. Charlie's room?

Q. Yes.

A. I don't remember when I was in there last.

Q. Do you know whether or not you were in there in December?

A. Yes. It was before Christmas. I think me and Esther was looking for decorations. [306]

Q. What did you see in that room?

A. There was just a bed in there and a drawer.

Q. Were there any clothes in there?

A. Some of Charlie's clothes I think.

Q. Were there any other things in the room?

A. No. I don't remember.

(Testimony of Nannie Colson.)

Q. Before I forget it, you say you worked part of December. You knew, did you not, that Steve planned on a vacation at the end of the month?

A. Yes. He told me he was going on vacation some time after Christmas.

Q. That was general knowledge around there?

A. Yes.

Q. Now, Nannie, coming to this room, you said you sometimes used the back room for ironing?

A. Yes.

Q. Now when I say the back room I mean the room that later the fire occurred in. Were there any plug-in sockets in that room to put in an iron and electric appliances?

A. There is one in the corner that we used to put a plug in. We have to screw it in.

Q. Were there any other plug-ins there?

A. No, no other plug-ins.

Q. Any other sockets?

A. There are four of them, which you can take the bulb out and use.

Q. Was they all in working order?

A. There is one, I have trouble in it once in awhile.

Q. Is there one short-circuited?

A. Yes, the one on this corner. [309]

Mr. Crane: I wonder if I can see those pictures.

Q. Nannie, I will hand you defendant's Exhibit 2, which is a picture of a part of the interior of the room and ask you if you can recognize where the socket, whether this socket shown in the picture is

(Testimony of Nannie Colson.)
the one that was shorted or whether it was some other place in the room? You can just point out the shorted socket. You might just say if there is one here that might give us a better idea.

A. It's that one by the stove, in that corner, on this side (indicating).

Q. How far from the place then, from the opening going into the top?

A. It would be on that side (indicating).

Q. Just point so the jury can see, so the jury can see.

(The witness points to a place on the exhibit.)

Mr. Crane: That is defendant's Exhibit 2.

Q. The last time that you used the back room for ironing or utilities or anything like that, there was live current there? There was electricity in the room so you could get juice? A. Yes.

Q. I will hand you plaintiff's Exhibit F, which is a drawing of a floor plan of the building used for the purpose of illustration, and I will ask you to take the back room where the fire was, if you will, and indicate on that exhibit the position of the defective switch or defective wire or socket, about what part of the room?

A. You mean the one I told you that had a short in it?

Q. Yes. You may mark it by a pencil mark.

A. The one over here.

(The witness marks the exhibit.)

The Court: What type of mark did she use?

(Testimony of Nannie Colson.)

Mr. Crane: She just made a small X. May I just show this to the jury.

The Court: Yes.

(The jury examines the exhibit.)

Q. (By Mr. Crane): Now where did you keep the iron? A. The steam iron?

Q. It was a steam iron was it? A. Yes.

Q. That is, you mean by that an electric steam iron? A. Yes.

Q. Did it have a cord on it?

A. Yes. The steam iron.

Q. I am going to hand you Exhibit H, I will ask you by chance if you recognize that cord or have ever seen it before, if you know?

A. It looks something like a steam iron cord, but I don't know.

Q. You don't know? A. No.

Q. Does it look like the cord to the steam iron that was up there? A. Yes, the one I used.

Q. That's all, Nannie.

Redirect Examination [311]

Q. (By Mr. Hermann): Do you recall whether or not the steam iron cord had any tape wrapped around it? A. On the steam iron?

Q. On the cord? A. No.

(There were no further questions and the witness was excused from the stand.)

The Court: Well it appears hardly advisable to call another witness. It's about time for noon recess so we will recess the case until 2:00 o'clock.

(Thereupon the Court duly admonished the jury, and the regular noon recess was taken.)

After Recess

(At 2:00 p.m. Court reconvened and the trial of the cause was resumed. Both counsel stipulated to the presence of the jury and all necessary persons were again present.)

TOMMY GOODWIN

was then called as the next witness for the plaintiff and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

A. Tommy Goodwin.

Q. Where do you live, Mr. Goodwin?

A. Kotzebue. [312]

Q. How long have you lived at Kotzebue?

A. I was born and raised there.

Q. Do you know the defendant, Steve Salinas?

A. Yes.

Q. How long have you known him?

A. Since he came to Kotzebue.

Q. How long was that about?

A. Two-three years.

Q. Do you recall whether or not you saw him on the 25th of December, 1957?

A. I seen him every day.

Q. Do you recall him—whether you saw him on that day, Christmas day? A. Yes.

Q. What time was it the first time you saw him?

(Testimony of Tommy Goodwin.)

A. It was between three and five, anyway sometime around there.

Q. Where did you see him?

A. I don't know—at Harold Little's for a few minutes.

Q. Who was in Harold Little's at the time you saw him there?

A. A whole bunch of us was there. Me and Gene Starkweather was talking to ourselves. We didn't pay much attention to anybody else.

Q. Who, if anyone, was Mr. Salinas talking to?

A. I don't know.

Q. Do you know how long he stayed there?

A. No.

Q. Do you know what time it was about that he left there?

A. We stayed there quite awhile and then went up to Coffee Dan's and I stayed there all the time.

Q. Was Mr. Salinas at Starkweather's house when you left? A. No.

Q. Do you know what time he left the house?

A. I couldn't tell you that.

Q. How long had you been at Little's house when Mr. Salinas arrived?

A. When I went there about 3:30, something like that.

Q. How long were you there before Mr. Salinas came in? A. I was there when he came.

Q. How long had you been there when he came in? A. Oh, I would say a couple of hours.

Mr. Crane: I am going to object to this as im-

(Testimony of Tommy Goodwin.)
material and not connected with the issues in this case. I reserved my objection here thinking he would connect it up, but I cannot see where a visit to Harold Little's house on this date is material.

The Court: It is obviously preliminary. I presume the District Atttorney intends to connect it up. The objection must be sustained at this time.

Q. (By Mr. Hermann): How long were you in Mr. Little's house at the time Mr. Salinas came in the house?

A. I couldn't tell you exactly what time it was, but I got to Harold Little's place say about 3:00 or 3:30, something like that.

The Court: I beg your pardon. I just caught myself in an error. I mean that the objection is overruled at this time. You may proceed. [314]

Q. (By Mr. Hermann): Then how much longer did you stay? A. Did I stay?

Q. Yes. At Little's.

A. Oh, I stayed there until we got ready to go up and get coffee at Dan's. I don't know how long—it was pretty late anyway.

Q. How long did you stay at Coffee Dan's?

A. We were there, just sat down and were drinking coffee when somebody hollared "fire".

Q. When you say "we", who do you mean was there besides yourself?

A. Me and Gene Starkweather went in together and had some coffee there. There were quite a few other people in there—I couldn't tell you their names.

(Testimony of Tommy Goodwin.)

Q. What did you do when you heard them hollar "fire"?

A. Well, we started running for the fire.

Q. Would you state whether or not anyone was at the fire when you arrived?

A. Quite a few people were there already.

Q. Do you know whether or not there was anybody upstairs in the building? At that time?

A. When I got upstairs there was quite a few boys there already.

Q. Did Mr. Starkweather go with you to the fire? A. Yes.

Q. Now about how long after you saw Salinas was the fire?

A. Well I couldn't tell you exactly how many hours. [315]

Mr. Crane: I didn't get that answer.

A. I said I couldn't tell him how many hours there were.

Q. (By Mr. Hermann): What did you do after you arrived at the fire.

A. Well, the first thing I did I tried to get the water brigade going.

Q. Where did that brigade lead to and from?

A. It started from Ferguson's store, up the stairway there.

Q. Did you see Joe Brantley at all at the fire?

A. Yes.

Q. Where did you see him?

A. I saw him when I looked in there. They were just getting him through the attic hole there.

(Testimony of Tommy Goodwin.)

Q. Now where was he at the time you arrived, if you know. A. He was already there.

Q. Whereabouts in the building?

A. Where I saw him was upstairs.

Q. Now, havé you seen—did you see Mr. Salinas in the next few days after the fire?

A. Yes. The next day.

Q. Where did you see him on that occasion?

A. Down at Harold Little's. I generally go there every day.

Q. Did you talk to him at that time?

A. Yes.

Q. Would you state briefly what was discussed?

A. Well, we was talking—what we had between us—he wanted me to rewire the place where it had burned up. [316]

Q. Did he say when he wanted you to do this?

A. No. He told me to go ahead and do it any time I was ready.

Q. Did you do anything in this respect?

A. No. I just got all the material ready and they already stopped me from doing anything before I got started.

Q. I see. Was there any particular reason why you didn't go ahead?

A. Well, it was right after the holidays and I didn't feel very good. I was celebrating through the holidays and didn't feel like working.

Q. Where was Mr. Salinas at that time?

A. What do you mean by that?

(Testimony of Tommy Goodwin.)

Q. Do you know whether he was still in Kotzebue or not at that time?

A. No. He told me to go ahead and do it any time, so I wasn't—I just got all the material together, and never got around to it.

Q. Now in respect to this wire that you got together, who, if anybody, paid you for that wire?

A. What did you say?

Mr. Crane: If your Honor please, I object to that. It's immaterial and not connected with the issues of this case.

The Court: I fail to see the materiality of it, counsel. Can you suggest what materiality there can possibly be?

Mr. Hermann: Well, the fact of the defendant's leaving. It would bear, in my opinion, on whether he would have stayed to see the place rewired or not.

The Court: That has already been established, about his leaving. Inferences which you wish to draw from the facts may be [317] proper, but I cannot see where this particular fact would be material. Nor can I see now where you have connected up this meeting at Little's in the afternoon, to which objection was made. Is there any connection between that meeting and the case here on trial?

Mr. Hermann: Just to show his whereabouts, the whereabouts of the defendant, on the day of the fire.

(Testimony of Tommy Goodwin.)

The Court: Well that may possibly be material, but this last surely is not.

Mr. Hermann: Very well.

Q. (By Mr. Hermann): Mr. Goodwin, while you were fighting the fire, did you at any time see Mr. Salinas fighting fire?

A. Yes, he was there. But I never had time to pay no attention to anything. All I had in my mind was getting that water line going, trying to get that going.

Q. Did you see him do anything to fight the fire?

A. He was in there, but I never watched what he was doing. I didn't have time for that.

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Tommy, since they have gotten this—Tell the jury where Harold Little's house is with reference to the Rotman Store where Steve Salinas lived, and with reference to the Kotzebue Grill which Steve Salinas owned, so we will be a little more familiar with it. [318]

A. You mean in distances?

Q. Yes.

A. Well I couldn't recall how many blocks from Rotman's Store, but I would say about two blocks from the restaurant.

Q. In other words, coming from Rotman's Store, you go down to Harold Little's first, and then go on a couple of blocks to the restaurant. Is that right? A. That's right.

(Testimony of Tommy Goodwin.)

Q. Harold Little's is a new building right on Front Street, facing the Bay, is it not? Facing Kotzebue Sound right on Front Street?

A. That's right.

Q. In fact, to make it more clear, bring it out more, Harold Little's building is a new building next to the Airlines, and immediately in the rear is my yard where my office is. It's closer to Rotman's Store than it would be to the restaurant, would it not, or about half way, would you judge, Tommy?

A. Well, from Harold Little's over to Rotman's is a little bit further than that.

Q. Now around Christmas time, there was several people stopped at Harold Little's, wasn't there?

A. Oh, yes.

Q. Wasn't it more or less of a—I wouldn't say "hangout", but more or less of a place for people to drop in during the day?

A. That's one place if you are looking for somebody, you can generally find them.

Q. Or if you wanted a hot cup of coffee? [319]

A. No.

Q. Nothing unusual for Steve being there? For you or Steve being there? A. No.

Q. In fact you'd drop in there about every day?

A. Yes.

Q. You don't remember whether he came in Christmas Day, when he brought in some Christmas presents?

(Testimony of Tommy Goodwin.)

A. Are you sure it was Christmas Day or the day before Christmas? It wasn't Christmas.

Q. You wasn't probably there then?

A. No.

Q. Definitely not the 24th. It was the 25th?

A. I was up at my place the 24th, because I didn't get to town.

Q. You didn't get to town? A. No.

Q. Now just correct me if I am wrong. The way I understand from your testimony, Steve Salinas was there with Little and the gang all that afternoon and evening at Little's? Is that correct?

A. No. Like I said, I don't recall how long he stayed because I was paying no attention to nobody else. We had our own conversation.

Q. In other words, all you know is that Steve dropped in there in the afternoon?

A. That's right.

Q. And you don't know where he went when he left there? A. No. [320]

Q. Now coming to the Kotzebue Grill, did you ever do any wiring in that building?

A. No sir.

Q. Do you know anything about the condition —by the way, you are an electrician, are you?

A. Yes sir.

Q. Did you ever have anything to do—you say you never had anything to do with the wiring of the Kotzebue Grills?

A. No sir, I never have.

Q. Have you examined it?

(Testimony of Tommy Goodwin.)

A. I did, at the time when we was getting material, to see what I needed.

Q. What condition did you find it in?

A. Awful poor shape.

Q. Would you call it—when you say poor shape, would you call it more or less dangerous?

A. It is.

Q. It is dangerous? A. Yes.

Q. From a fire hazard?

A. That's right.

Q. And was prior to the fire?

A. I didn't get that.

Q. And it was that way prior to the fire, prior to the date of the fire it was a hazard? The wire in the building was hazardous?

A. That's right. [321]

Q. In other words, dangerous wiring all through?

A. The whole building is dangerous, the wiring.

Q. By the way, Tommy, if you remember, how was Steve dressed Christmas Day when he was down there?

A. I wasn't paying no attention to nobody's clothes, because I wasn't in the mood of watching what they was wearing.

Q. That's all Tommy, no further questions.

(There were no further questions and the witness was excused from the stand.)

RAY FERGUSON

is then called and sworn as the next witness for the plaintiff, and then testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

A. Ray Edward Ferguson.

Q. Where do you live, Mr. Ferguson?

A. Kotzebue.

Q. Were you living there in December, 1957?

A. Yes sir, I was.

Q. Whereabouts do you live in relationship to the Kotzebue Grill?

A. Well, half a block from the Grill.

Q. What direction would that be—east, west, south?

A. It would be south, I believe.

Q. Did you attend the fire at the Kotzebue Grill on the 25th of December?

A. Yes sir. [322]

Q. What was the first you heard of the fire, the first you knew about it?

A. I heard the bell first of all, the fire warning bell, I believe. Then my wife and another person came in and said there was a fire.

Q. Would you speak a little louder, please. What did you do then?

A. I grabbed the fire extinguisher that was in my place and ran over and gave it to some people on the roof. I handed it to them, and then I went back into the restaurant to try and get some water.

Q. What restaurant do you mean?

(Testimony of Ray Ferguson.)

A. Ferguson's restaurant.

Q. Where was Ferguson's restaurant in relation to the Grill?

A. Next to the Kotzebue Grill.

Q. What did you do then?

A. I tried to get some boys to carry water over.

Q. Were you successful in this?

A. Yes.

Q. Will you state whether or not you went inside the building?

A. Yes. I went inside, and I went upstairs and right below the fire there.

Q. Right below it? A. Yes.

Q. Were you able to see the fire?

A. Not the blaze itself, no.

Q. Do you know what time it was that you arrived at the fire?

A. No. But by using the time of the show I figure it was about 11:00 or 11:15, someplace in there. [323]

Q. While you were at the fire do you know whether or not the lights were on at any time in the back room?

A. They had been turned on.

Q. Were they burning at all?

A. Not in the back room, but they were on in the hall. They were on—I seen lights someplace in there.

Q. Do you recall where you saw them?

A. I believe one was in the bathroom. I am not sure.

(Testimony of Ray Ferguson.)

Q. Do you know whether or not they remained on?

A. No. Somebody splashed some water on a hot wire there and it started flashing so they called to shut the juice box off.

Q. Now, Mr. Ferguson, do you know who was the owner of the Kotzebue Grill? Before the fire?

A. I believe Mr. Salinas was. Oh, I think.

Mr. Crane: That is objected to, Your Honor. It's irrelevant, immaterial and incompetent who the owner of the building was, prior to the fire.

The Court: It may be relevant, thinking of your examination of some of these witnesses. He may answer.

Q. Would you repeat the question.

Mr. Crane: Yes or no, if your Honor please.

The Court: You may answer yes or no.

A. Not exactly, no. But I believe it was Archie Ferguson.

Mr. Crane: If Your Honor please, I object to what he believes. If the witness doesn't know——

The Court: I think he may answer to the best of his belief.

That is your belief—who did you say?

A. I believe Archie; Archie Ferguson or Beulah Levy, or the B & R.

Q. (By Mr. Hermann): What relationship is Archie to you?

A. My uncle and legal guardian.

The Court: Your uncle and legal guardian?

A. Yes.

(Testimony of Ray Ferguson.)

The Court: You say you believe he owned the building? A. Yes.

Q. (By Mr. Hermann): Have you ever lived at the Kotzebue Grill?

A. It would be about ten years ago I guess. We lived upstairs when we were small.

Q. Do you know how old a building the Kotzebue Grill is?

A. I believe a little over fifteen years, I am not sure.

Q. Do you know of an organization known as the Far North Tug and Barge Company?

A. Yes, I do.

Mr. Taylor: I object, Your Honor. This is incompetent, irrelevant and immaterial and doesn't prove any of the issues of this case, what a tug and barge company does.

The Court: Of course the materiality of any such issue does not yet appear. There has been some testimony in this case about [325] Ferguson previously owning the building, but nothing about the tug and barge company.

Q. (By Mr. Hermann): Do you know whether it was Mr. Ferguson or the Far North Tug and Barge Company that owned this building?

A. No, I don't.

Q. You don't know that? A. No, I don't.

Q. Have you been in the building since Mr. Salinas acquired it? A. Yes, I have.

Q. Have you been in the restaurant part?

A. Yes.

(Testimony of Ray Ferguson.)

Q. Would you tell us whether or not there is any difference in the furniture and fixtures in the restaurant part now than there was before Mr. Salinas owned it?

Mr. Taylor: I am going to object to that. He hasn't testified that he knew what the condition of the furniture and fixtures was before Mr. Salinas took it.

The Court: That is correct. A better foundation needs to be laid.

Q. (By Mr. Hermann): Had you ever worked in the Kotzebue Grill?

A. Not exactly. Not except for odd jobs and stuff. But I never had a regular job.

Q. What kind of odd jobs did you do? [326]

A. Just cleaning up or something like that.

Q. Do you know what kind of furniture and fixtures the Kotzebue Grill had at that time?

A. Do you mean in the restaurant part?

Q. Yes.

A. I only noticed there is a new stove put in the restaurant part.

Q. Do you know of any changes that have been made in it from the way you saw it?

A. Yes. There was a stairway inside, that let down inside the restaurant, and that was cut off, I believe, and they were using the stairway outside to go upstairs.

Q. Do you know whether there has been any change in the counter and other fixtures?

A. I don't believe it is changed since it was fixed up before he bought it.

(Testimony of Ray Ferguson.)

Q. Do you know to your own knowledge what Mr. Salinas paid for the Grill?

Mr. Taylor: Just a minute, your Honor, I am going to object. It's incompetent, irrelevant and immaterial.

The Court: The question is proper, counsel,—"of your own knowledge"—; he may answer yes or no. A. No.

Q. (By Mr. Hermann): While you were fighting the fire in the Grill did you at any time see Mr. Salinas? A. Yes, I did.

Q. Do you know whether or not he was doing anything to fight the fire? [327]

A. Not to my knowledge, I don't believe he was.

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Ray, speaking of the furnishings of the Kotzebue Grill, that counsel has asked you about, I believe at one time there was an old high counter and high stool in there. Is that correct? A. Yes.

Q. They were later changed and more modern equipment put in? A. Yes.

Q. Was that put in just before Mr. Salinas purchased it or just after he purchased it, or do you know?

A. I believe it was put in before, but I wouldn't say for sure; but I believe it was.

Q. But after Mr. Salinas purchased it, if you remember, didn't he go ahead and make a lot of improvements, redecorate and repaint?

(Testimony of Ray Ferguson.)

A. Yes, I believe he painted it. It has been fixed up a little.

Q. Did he put in some additional equipment like freezers and electrical equipment?

A. Yes, he did.

Q. He did put in a lot of extra equipment?

A. Yes.

Q. Now, how was Steve dressed the night of the fire?

A. Would you say that again.

Q. How was Steve dressed the night of the fire?

A. What I can remember, just a big coat is all, a down parka. [328]

Q. Now, Ray, the night of the fire, in the first place, that is a fairly small entrance, isn't it, going up those steps? A. Yes.

Q. I presume that when the news got around that there was a fire, practically the whole town was down there, was it not? A. Yes.

Q. You were all filing in and out trying to get to it as best you could, is that it? A. Yes.

Q. A log of congestion both upstairs and downstairs? A. Yes.

A. A lot of drunks getting in your way all the time you were there?

A. I don't believe—there was some people drinking in the other restaurant, but I don't believe they was what caused the confusion.

Q. In other words, things happened so quickly, through the entire confusion, its kind of hard to remember just what did happen. Isn't that the way it was?

(Testimony of Ray Ferguson.)

A. Would you say that again.

Q. Coming back this way, when you first went to the fire you gave them an extinguisher, and at that time they was fighting the fire on top of the house, is that right? On the roof? A. Yes.

Q. Later on you were able to get into the interior of the room where the fire was and fight it there?

A. Not personally. There was already people up there. [329]

Q. Who was the first one that organized the bucket line and got it started? Was that Tommy Goodwin and that cook?

A. I am not sure on the side upstairs part because I wasn't there then.

Q. Where did you remain?

A. I was trying to get water, mostly out of our place.

Q. I hand you defendant's Exhibit No. 7, which you will notice is a picture of a stairway of the Grill. I am not sure I explained it. Just point out with reference to the stairway where your place is, and hold it up so the jury can see, and just show what you were doing there that evening.

A. Right on this side (indicating on the exhibit), is a doorway leading out of the back entrance of the restaurant, and they had a bucket line going out the back end and up the stairway.

Q. To the fire? A. Yes.

Q. Now the water system—you have a well there in the Kotzebue Grill, do you not?

(Testimony of Ray Ferguson.)

A. Yes.

Q. The water system in the Kotzebue Mercantile, the water system in the Kotzebue Mercantile was working? A. Yes, it was.

Q. You confined your time to the Kotzebue Mercantile to getting the water bucket line across?

A. Most of it, yes.

Q. By the way, Ray, do you remember Charlie Norton—Dummy? A. Yes, I do. [330]

Q. Do you know what time it was about, in October or November, that he left Kotzebue?

A. Not the exact date, but I remember somebody saying he had left.

Q. You know he is not around there now, or wasn't at the time of the fire?

A. I am not sure.

Q. You are not certain? A. No.

Redirect Examination

Q. (By Mr. Hermann): Just one question. Is the Kotzebue Mercantile often referred to as Ferguson's? A. Yes, it is.

(There were no further questions and the witness was excused from the stand.)

ELAINE PATTERSON

is called and sworn as the next witness for the plaintiff, and then testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

(Testimony of Elaine Patterson.)

A. Elaine Patterson.

Q. What is your occupation, Mrs. Patterson?

A. Office Manager for LaBow Haynes Company of Alaska, Anchorage Insurance Agency.

Q. What are your duties as office manager?

A. I have charge of the overall operation of the office, the closing, getting work out, rating policies.

Q. Could you speak a little louder, please?

A. Yes.

Q. Who has custody and control of the files and records of LaBow Haynes Insurance Co. normally?

A. I have access to all of the records.

Q. Do you know whether there is a file with LaBow Haynes Co., an account with Natividad Salinas?

A. We have one for Steve Salinas doing business as the Kotzebue Grill.

Q. I see. When did you first hear of Steve Salinas?

A. We had a letter from Mr. Salinas on July —his letter of July 24, which was received in our office on July 30, 1956, requesting rates on insurance on his building in Kotzebue.

Q. Do you have the original of that letter?

A. I do.

Q. I would like to offer the letter into evidence.

Mr. Taylor: We would like to take a look at it first, Your Honor, I believe.

(Mr. Taylor looks at a letter.)

We would object until certain figures and cer-

(Testimony of Elaine Patterson.)

tain writings in pencil are explained fully or removed.

The Court: May I see it.

(The letter is given to the Court.)

A. I can explain all of those. [332]

The Court: Well I think possibly, first you should have the letter marked for identification and then ask the witness to explain the writings.

Mr. Hermann: I would then like to have this letter marked for identification.

(A letter to LaBow Haynes from Steve Salinas is marked for identification as plaintiff's Exhibit N.)

Q. (By Mr. Hermann): Mrs. Patterson, I hand you plaintiff's exhibit N for identification and ask you if you will explain what the figures and writing below the body of the letter represent?

A. At the time I received the letter I checked the various rates. On the left-hand side it shows "Rated, P.47;" which is the page, and "L-31" with the rating book. The figures below that are computations for the rates on the building, equipment and stock. Below that, after I had checked on that, I called the local representative for one of the insurance agencies and have "called Merle. Will check to see if Gould's can write", to check to see whether or not they could write the insurance. Then I have in shorthand that I received word from—here I don't know, I don't have the date this was received—"As we approached our market for placement of coverage——"

(Testimony of Elaine Patterson.)

Mr. Taylor: I am going to object to the reading——

The Court: You asked that this matter be explained and how else can this be done? [333]

Mr. Taylor: She can explain what things are on it there, not what they are themselves.

The Court: You may explain these. All this is writing of yourself pertaining to the letter?

A. Yes sir. Getting information which I had been requested to get as to rates and so on.

The Court: Well, that is sufficient. The exhibit may then be received in evidence.

(Plaintiff's Exhibit N is received in evidence.)

Mr. Hermann: I would like to read the exhibit to the jury.

The Court: Very well.

Mr. Hermann: It is on the letter head showing Steve Salinas, owner, Kotzebue Grill, Alaska's Farthest North Restaurant, Kotzebue, Alaska, July 30, 1956, and is addressed to LaBow-Haynes Company, of Alaska, Inc., Box 627, Anchorage, Alaska, and reads as follows: "Gentlemen: A local business man has recommended your firm to carry insurance for my business in Kotzebue. I am writing this letter of inquiry for the following before I go ahead with this matter: What rate would you charge and how much per month of payment, and when can you set the time for beginning of Insurance on the following: 1 building—$25,000.00; Fixtures & Equip.—$10,000.00; Stock (merchandise)

(Testimony of Elaine Patterson.)
$15,000.00; Total—$50,000.00. Please reply as soon as possible. Yours truly, Kotzebue Grill, by Steve Salinas, Owner." Then the figures and other writing. [334]

The Court: Did you give the date?

Mr. Hermann: Dated July 30, 1956.

A. That was the date we received it.

Mr. Hermann: Oh yes. The date it was written was July 24. The date received would be July 30, 1956.

Mr. Taylor: Written July 24?

Mr. Hermann: Typed underneath the letterhead.

Q. (By Mr. Hermann): What did you do, if anything, in respect to writing this letter?

A. I wrote to Mr. Salinas on August 7 thanking him for his request for insurance and advising him that when we approached our market for coverage we were told there was other insurance in effect on the property and that if he was still interested in insurance, if he would let us know the expiration date of the policy in effect we would again attempt to secure a rate or coverage for him.

Q. Then what happened in relation to your business with Mr. Salinas after that?

A. On August 11 he wrote a letter which was received in our office on August 17, in reply to my letter of August 7, and he advised that he had an additional $14,000.00 in stock which had just arrived on the Alaska Steamship Company's vessel Galena, which was not covered by insurance.

(Testimony of Elaine Patterson.)

Q. Do you have the original of that?

A. I do, sir.

Mr. Hermann: I would like to have this marked for identification. [335]

(A letter signed by Steve Salinas and dated August 11, 1956, to LaBow Haynes Co. is marked for identification as plaintiff's Exhibit O.)

Mr. Hermann: I would like to move that plaintiff's Exhibit O for identification be accepted as evidence.

Mr. Taylor: I believe I would like to see that also, Your Honor.

(The exhibit is given to Mr. Taylor.)

And I think I would just like to see the one she just read.

The Court: That may be produced if you require it; the letter which the defendant testified to dated August 7—it would be a copy of the letter?

A. That's right sir.

Mr. Taylor: We have no objection to the introduction of this letter.

The Court: It may be received. Do you wish the copy too, counsel. It may be received if it has any value.

Mr. Taylor: I think we should show the whole correspondence, Your Honor, from both ends.

The Court: Very well. The copy of the letter of August 7 may likewise be received.

(Plaintiff's Exhibit O is received in evidence.) [336]

(Testimony of Elaine Patterson.)

(Plaintiff's Exhibit O, a letter (copy) from LaBow-Haynes to Steve Salinas dated Aug. 7, 1956, is marked for identification and admitted in evidence.)

Mr. Hermann: If Your Honor please, I would like to read both Exhibits O and P, the letter of August 7 is Exhibit P, and the letter received August 17, Exhibit O, to the jury.

Mr. Taylor: If Your Honor please, I believe he should also read the copy of LaBow Haynes letter to Mr. Salinas.

The Court: That is what he just stated, counsel. He is going to read both.

Mr. Hermann: (reading), "August 7, 1956, Mr. Steve Salinas, Kotzebue Grill, Kotzebue, Alaska. Dear Mr. Salinas: Thank you for your letter requesting an insurance quotation on your property in Kotzebue. When we approached our market for the rating of this coverage, we were advised that there is now insurance in effect on the property. If you are still interested, please advise us of the expiration date of the insurance now in force, and we will again try to secure a rate for you. Yours very truly, LaBow Haynes Company of Alaska, Inc., by Elaine Patterson."

And then Exhibit O, "August 17, 1956," stamped in, "Kotzebue Grill, Kotzebue, Alaska, August 11, 1956, Steve Salinas, Owner, Alaska's Farthest North Restaurant. LaBow Haynes Co. of Alaska, Inc. 225 East Fifth Avenue, Anchorage, Alaska, Attention: Elaine Patterson, [337] Gentlemen: In

(Testimony of Elaine Patterson.)
reply to your letter of August 7—I have an additional $14,000.00 in stock, just arrived on the Alaska Steamship Co.'s vessel "Galena", which is not covered by insurance. This stock will last at least until the arrival of the June boat in 1957. Therefore, I would like to know your rate for this stock. Regarding insurance in effect, it expires in the spring of 1957 but I am not too well satisfied and since reports concerning your company have been most favorable, thought perhaps you could give me a quotation. I would appreciate your answer to this letter and will be happy to give any information needed. Very truly yours. Steve Salinas" and type written "Steve Salinas".

Q. (By Mr. Hermann): Mrs. Patterson, did you ever confer with Mr. Salinas himself concerning this insurance?

A. Yes. I wrote him on August 29 that it would be necessary for us to place the coverage which he had requested, the $14,000.00, if we placed that, through Lloyd's of London and that we could probably finance it the same——

Q. Was that another letter?

A. That was August 29.

Q. This is your copy?

A. This was our copy of the letter to him. And that I planned to be in Kotzebue on Sunday and would talk to him at that time.

Mr. Taylor: Was that in '56?

A. 1956, yes.

(Testimony of Elaine Patterson.)

Mr. Hermann: I would like to have this marked for identification [338] purposes only.

(A copy of a letter dated August 29, 1956, to Steve Salinas from LaBow Haynes Co. is marked for identification as plaintiff's Exhibit Q.)

Mr. Taylor: No objection.

The Court: The exhibit has not yet been offered.

Mr. Hermann: At this time I will offer it.

The Court: Is this letter of August 29, the one to which Mrs. Patterson testified? A. Yes.

The Court: Very well, it may be received.

(Plaintiff's Exhibit Q is received in evidence.)

Mr. Hermann: I would like to read it to the jury.

The Court: Very well.

Mr. Hermann: "August 29, 1956. Mr. Steve Salinas, Kotzebue Grill, Kotzebue, Alaska. Dear Mr. Salinas: Thank you for your letter with further regard to insurance which you wish to place through our office. It will be necessary for us to place this coverage through Lloyd's of London, and we believe that it would be possible to write fire and extended coverage insurance in the amount of $14,000 for about $900 for the first year. This premium could be financed in the same manner as that which we have for the Far North Tug and Barge Co. I plan to be in Kotzebue with the Arctic [339] Alaska Tour on Sunday, and will stop in to see you at that time if you have any further questions

(Testimony of Elaine Patterson.)
that I might answer for you. Yours very truly, LaBow Haynes Company of Alaska, Inc., by Elaine Patterson". And there is handwriting on the bottom.

A. That was the order which I took. I took this letter with me when I went to Kotzebue and this was the amounts that he requested that we place for him at that time. I had written them on the letter.

Q. (By Mr. Hermann): You had written it on the letter?

A. At the bottom of the letter in writing: "Sept. 4", the year is not written. "$18,000 stock, $7,500 equipment, $24,500 building".

Q. Now Mrs. Patterson, is that the same figure as the one which he requested?

A. No. There is some difference in that. The final amount he decided he wished to place was somewhat different than what he originally requested.

Q. Do you know what the difference was?

A. The letter is there. I believe it was $25,000.00 on the building and $10,000.00 on the furniture and fixtures, I believe, and $15,000.00 on the stock; where it was changed—the amount was changed from $25,000.00 to $24,500.00 on the building, and the fixtures and equipment from $10,000.00 to $7,-500.00 and the stock was changed from $15,000.00 to $18,000.00.

Q. Was any particular reason mentioned by Mr. Salinas for the changes in figures?

(Testimony of Elaine Patterson.)

A. I don't recall sir.

Q. You don't know why they were changed?

A. No sir. [340]

Q. Now, how, if you know, was this policy to be paid for? Was it to be paid in advance?

A. No. It would be paid on the installment basis. We would finance it with a 20% down payment and then a monthly payment to be made after the down payment.

Q. I see. What was done with respect to that?

A. He signed a finance contract form. However, it was not completed at that time. He signed it in blank since I didn't have the placing of the coverage or anything, and then I made it up and completed it at the time when we received the policies and so forth.

Q. Do you have that contract?

A. Yes sir.

Mr. Hermann: I would like to have this marked for identification.

(A premium Finance Contract signed by Steve Salinas on Sept. 3, 1956, is marked for identification as plaintiff's Exhibit R.)

Mr. Taylor: No objection.

Mr. Hermann: At this time I would like to have plaintiff's Exhibit R for identification accepted as evidence.

The Court: The exhibit may be received.

(Plaintiff's Exhibit R is received into evidence.)

The Court: Possibly it should be made clear to

(Testimony of Elaine Patterson.)
the jury. Are LaBow Haynes Co. agents or insurer? [341]

Q. (By Mr. Hermann): Would you explain that, please.

A. Yes sir. We are agents and brokers. We represent various companies and we don't issue the policies. We aren't personally liable for insurance which is taken out. It is placed with companies, either domestic or surplus lines, such as Lloyds of London.

Q. On this form "Alaska Bancorporation" would you explain what that is.

A. That is actually a financing agency in Anchorage.

Q. It is not an insurance company?

A. No, it is not.

Q. They were then the ones that would finance the contract?

A. They would have, normally. However, we did not put it through them. We went ahead and remitted the amount of the premium to the Company ourselves, and we, in this particular case, took the payments as they came up. In other words, we advanced the premium to the Company and the payments, then, were made to us.

Q. Actually, then, this form was confined to your own use?

Mr. Taylor: Just a moment, Your Honor, I am going to withdraw my objection to this under the testimony of the witness.

The Court: Your objection?

(Testimony of Elaine Patterson.)

Mr. Taylor: I beg your pardon. I am withdrawing my consent to the introduction and object to it now, as the witness testifies that this contract was not put in effect with the parties named in the contract, so it would be a mere nullity and have no bearing on the issues in this case. [342]

Mr. Hermann: I think it would, Your Honor.

The Court: Just a minute. I cannot see what difference it would make, counsel. The finance contract, the premium finance contract appears to have been paid on behalf of the Alaska Bancorporation. The witness, who is the manager of LaBow Haynes, said they elected to handle it themselves. I cannot see where it would make any difference.

Mr. Taylor: It would not be a contract then, between them and I don't believe such a contract would be competent, relevant or material to the issues. And I think the policies themselves, Your Honor, or a daily report of those policies would be.

The Court: Doubtless they will be produced. This may have some value.

Mr. Taylor: Who to?

The Court: Well I am not going to comment on the evidence. It may be received.

Mr. Hermann: I would like to read the contract to the jury.

(Plaintiff's Exhibit R is then read in its entirety to the jury by the United States Attorney.)

The Court: May I see that again.

(The exhibit is given to the Court.)

(Testimony of Elaine Patterson.)

I noticed as you read it that the names, the schedule, the listed schedule of policies, these show expiration dates of 9-3-57. Do you propose to show these were renewals? [343]

Mr. Hermann: Well, we propose to show that one policy is a renewal and the others new policies issued on the same basis.

The Court: Oh. Very well. Mrs. Patterson, do you have the policies referred to in this finance contract?

A. I have our daily report of those policies.

The Court: Would they be material? Rather than clutter up the record, if there were renewals or extensions—isn't that all that would be necessary. If these policies expire in effect in 1957 they could not be of much value.

A. We have the renewal policies also. I have the renewal policies also.

Mr. Taylor: May we take a recess at this time?

The Court: Yes. We will take a recess for ten minutes.

(Thereupon at approximately 3:05 a recess was taken, the jury being first duly admonished.)

After Recess

(Both counsel stipulate as to the presence of the jury; the witness on the stand at recess resumes the stand for further direct examination; and all other necessary persons again being present, the trial resumes.)

Q. (By Mr. Hermann): Mrs. Patterson, I be-

(Testimony of Elaine Patterson.)
lieve you testified last, that the policies referred to in the Bancorporation contract, the finance contract, were issued, and renewed later by other policies? Is that correct? [344] A. Yes.

Q. Do you have these policies? A. Yes sir.

Q. Do you have the one on London Assurance, No. 511348.

A. Yes. That was the policy from '56 to '57, together with the renewal certificates for '57 to '58.

Q. That one had a renewal certificate rather than a new policy? A. That's right.

Mr. Hermann: Let's finish with this one first. I would like to have this labeled for identification.

The Court: Well, I think we had already identified it.

Mr. Hermann: I would like to move it into evidence.

The Court: What was the renewal term, another year?

A. Another year, yes.

Mr. Taylor: No objection.

The Court: The policy and renewal certificate may be received.

(A policy from London Assurance to Steve Salinas, No. 511348, together with attached renewal certificate is marked for identification and received in evidence as plaintiff's Exhibit S.)

Q. (By Mr. Hermann): Would you tell us what term this was to run?

A. The policy as originally written was for a

(Testimony of Elaine Patterson.)

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Q. (By Mr. Hermann): Would you tell us what term this was to run?

A. The policy as originally written was for a

(Testimony of Elaine Patterson.)
period of one year, Sept. 3, 1956, to 1957, Sept. 3.

Q. Where would we find that on the policy?

(The witness indicates on the Exhibit.)

A. The term is near the head of the page. Yes, here, from Sept. 3, 1956 to Sept. 3, 1957.

Q. Where is the amount of this policy shown, the amount of coverage?

A. On the policy for the first year it is shown in this portion of the policy (indicating); on the renewal policy it is shown here on the certificate (indicating).

Q. Now as to the Lloyd's of London policy, No. 65688, do you have the policy here?

A. Yes sir. That was for a period from Sept. 3, 1956 to Sept. 3, 1957.

Q. And do you have the renewal?

A. Yes sir. That was one from 1957 to 1958.

Mr. Hermann: We would like to put them together for this purpose.

Mr. Taylor: No objection, your Honor.

The Court: They may be admitted. The policy and renewal certificates may be attached.

Mr. Hermann: Actually, it is a renewal policy.

The Court: The two policies may be attached together and received as an exhibit. That one has a renewal endorsement on it?

A. No, I don't believe so. It has an annual plan endorsement. That's right. It shows it can be renewed at a reduction in rate which was given on renewal policies, although this is a new policy. On Lloyd's certificates they won't issue a renewal certificate. They issue a new policy.

(Testimony of Elaine Patterson.)

Q. (By Mr. Hermann): Would you put these in order then, with the renewed policy on top, the latest policy on top. I would like to offer them——

The Court: They have been ordered received.

Mr. Taylor: No objection. [346]

(Policy No. 65688 and Policy No. 68021, the renewal policy, are marked for identification and admitted in evidence as plaintiff's Exhibit T.)

Q. (By Mr. Hermann): Was there any difference between the amount of the policy and the renewed, new policy? A. No sir.

Q. They were substantially the same?

A. Yes sir.

Q. How much was that one for?

A. That one was for $20,000.00, I believe. The first year was for $20,000.00, renewed for $20,000.00; then they reduced that one. After the renewal they reduced it to $10,000.00, but that additional $10,000.00 was changed over to the other policy, so the total amount of the policies was the same.

Q. This particular policy was reduced to $10,000.00? A. The second year. That's right.

Q. In regard to policy No. 65689, Lloyd's, was there a new policy issued on that one?

A. Yes sir.

Q. Do you have the old policy also? [347]

A. Yes sir.

Q. Would you put them together, with the renewed or new policy on top.

(After the witness does so, the items are shown to defense counsel.)

(Testimony of Elaine Patterson.)

Mr. Taylor: No objection, your Honor.

The Court: These policies, the original and the renewal, may be received as one exhibit.

(Policy No. 65689, and the renewal policy, No. 68022, are marked for identification and received in evidence as plaintiff's Exhibit U.)

The Court: What company did you say this was, this last one?

A. That was Lloyd's of London, also.

Q. (By Mr. Hermann): Would you give us the amount of London Assurance, this last one?

A. Those were $3,000.00.

Q. That was the first one, London Assurance; that was $3,000.00. And this last one?

A. This was $27,000.00 and——

The Court: The renewal for London Assurance was $3,000.00?

A. Yes.

Q. (By Mr. Hermann): Now in regard to these last two, that is a policy and renewal policy, was there a change in the amount shown?

A. Yes there was. Also on this policy in the first year it was in [348] the amount of $27,000.00 and was renewed in the amount of $27,000.00, and underwritten to increase that to $37,000.00, the difference between that and the other policy. The total remains the same.

Q. Was the distribution of the insurance changed, that is, as to quantity of the property?

A. That was not changed at any time as to building and fixtures.

(Testimony of Elaine Patterson.)

Q. That was never changed between the first policy and any of the renewals? A. No sir.

Q. What was the total amount of insurance carried from September of 1956 up until the time of the fire?

A. The total would have been $50,000.00.

Q. Now has any demand ever been made for payment of any of that insurance?

A. We had a letter from Mr. Taylor advising of the loss.

Q. Do you have the original of that letter?

A. Yes sir.

Q. Will you remove it from the file please. What was the date you received that letter?

A. It was written on March 3, 1958 and we received it on March 5, 1958.

Mr. Hermann: I would like to have this labeled for identification.

The Court: Again we can skip the identification if the letter is not objected to.

Mr. Hermann: I will offer it in evidence then.

Mr. Taylor: I would like to see this one. [349]

(The letter is shown to Mr. Taylor.)

Mr. Taylor: No objection.

The Court: The letter may be received.

(A letter dated March 3 from Warren A. Taylor to LaBow Haynes Co. is marked for identification and received in evidence as plaintiff's Exhibit V.)

Mr. Hermann: I would like to read plaintiff's Exhibit V to the jury.

(Testimony of Elaine Patterson.)

Mr. Taylor: Just a minute, your Honor. If Mr. Hermann is going to read that, I am going to insist that he read all the exhibits, your Honor. I don't think he can single out any certain exhibit and read it just because it's convenient, where he has other exhibits.

The Court: I think that is entirely the privilege of the person examining the witness. If you wish the other exhibits read entirely to the jury, that you may do. He may read it.

(Plaintiff's Exhibit V is read in its entirety to the jury by Mr. Hermann.)

Q. (By Mr. Hermann): Do you know to your own knowledge that this letter was answered?

A. Yes sir. Mr. Dimmick, who is the manager of the agency, answered a portion of it, and I answered a portion of it with the return premium.

Q. You returned the unearned premium? [350]

A. That is correct. We returned that unearned premium and I sent that letter of transmittal myself.

Q. Do you have a copy of that letter?

A. Yes sir.

Mr. Hermann: I would like to introduce the copy in evidence.

Mr. Taylor: I take it that's a partial reply to my letter?

A. All I had anything to do with was the return premium.

The Court: It may be received.

(A copy of a letter from LaBow Haynes to

(Testimony of Elaine Patterson.)

Warren A. Taylor, dated March 24, 1958, is marked for identification and received in evidence as plaintiff's Exhibit W.)

Mr. Hermann: I would like to read plaintiff's Exhibit W to the jurors.

(Plaintiff's Exhibit W is read in its entirety to the jury by Mr. Hermann.)

Q. (By Mr. Hermann): Would you state what the word "enc." means.

A. That was the check which we forwarded.

Q. I see. Did you state there was another letter written in answer to Mr. Taylor's inquiry?

A. Yes sir. Mr. Dimmick wrote to Mr. Taylor.

Q. Do you have that letter? [351]

A. Yes sir.

Q. Where did you get the letter?

A. That was a part of our file.

Mr. Hermann: I would like to have this received in evidence also.

Mr. Taylor: No objection.

The Court: The copy of the letter may be received.

(Copy of a letter from E. T. Dimock of LaBow Haynes to Mr. Warren A. Taylor, dated March 29, 1958, is marked for identification and received in evidence as plaintiff's Exhibit X.)

Mr. Hermann: I would like to read plaintiff's Exhibit X to the jury.

The Court: Yes.

(Plaintiff's Exhibit X is read in its entirety to the jury by Mr. Hermann.)

(Testimony of Elaine Patterson.)

Q. (By Mr. Hermann): Mrs. Patterson, was any record kept of the actual payments made on these policies? A. Yes sir.

Q. What kind of a record was that?

A. Our regular bookkeeping account card. [352]

Q. Is that the type of card you customarily keep in the operation of your business?

A. Yes sir.

Q. Do you have that? A. Yes sir.

The Court: You are referring to the record of payment of premiums?

A. Yes sir. The payment of premiums.

Q. Is this an original record or a copy?

A. Ours is the copy. Our bookkeeping records are copies.

Q. Do you keep the originals of the entries?

A. No sir.

Q. What becomes of the original?

A. Ordinarily those go to the assured.

Q. Were the entries on this all made on the same day or on separate days?

A. No sir. Over a period from, well, actually from October of 1956 until March of this year.

Q. Was any original record including all of that kept at all? A. No sir.

Mr. Hermann: No sir. I would like to move the account sheet be introduced in evidence.

The Court: I fail to see the purpose in it.

Mr. Hermann: The purpose, I plan to show the habits of the defendant in paying his insurance. As

(Testimony of Elaine Patterson.)
a general rule he was behind [353] in the payments, and made large payments shortly——

Mr. Taylor: Just a moment, your Honor. We are going to object. It shows to the contrary to the exhibit that he was ahead on his payments.

The Court: I asked the United States Attorney for what purpose this is offered and I think his answer is quite proper. Whether or not it shows what he purports to have it show is a question for the jury. Otherwise I could see no relevancy in it. If it has any evidentiary value it may be received in evidence.

Mr. Crane: If your Honor please, I don't think this exhibit is properly identified and properly explained. If counsel will further explain the entries on it as to what the actual figures are——

The Court: Well I thought she explained it as a copy of the bookkeeping entries with reference to payment of premiums by Mr. Salinas.

Mr. Crane: It's a little difficult, your Honor, to know just the meaning of the figures.

The Court: Well, she may explain it further then. You might explain whether this is a book of original entry or a page from such book.

Mr. Hermann: I believe I did inquire as to that.

The Court: Possibly you did.

A. It is our bookkeeping record. The book, our permanent record of the person's account made in the regular course of business. I previously stated there was no original, we have no original showing all the entries. [354]

(Testimony of Elaine Patterson.)

Mr. Crane: They haven't shown what they are made from, your Honor.

Mr. Hermann: I was getting ready to go into that.

The Court: Very well. You may show from what source these entries were made.

Q. (By Mr. Hermann): Would you explain from what source these entries are made. Take the first entry and explain.

A. Well, our books are kept under the Hadley system, which is the Hadley system of bookkeeping and which is quite common with companies. There is a statement which is the same thing as this record, is a duplicate statement. This entry is made and also goes on the company record. There are two carbon copies, an entry also being made for the company this represents, that we made payment. These, as I say, are for the period of 1956, and this one shows the date of 9-3-56. The first entry is where we began to bill for the policies which had been written. Then it gives the dates right straight through the entries.

Q. What would be the source of these three first entries then?

A. The invoices which we make up at the time we bill the policies and mail them to the assured.

Q. What are the first column of figures?

A. These are charges.

Q. What is the second column?

A. The second column is credits and the third column is the balance, so the fourth column is the

(Testimony of Elaine Patterson.)

previous balance. That is, under this system, [355] a cross reference as far as balancing the accounts in the books.

Q. The shaded column next to the edge?

A. The balance previous to this, and that is carried over here (indicating). That is a cross-reference to the bookkeeping system.

Q. And the other columns are charges, credits and balances? A. Yes sir.

Q. And the balance there is then the new balance?

A. The new balance on the account. Right.

The ourt: I think the testimony of the witness shows it conforms to the shopbook rule. It is not necessary in such case to prove each invoice.

Mr. Taylor: There is some things wrong there. Some items don't show the years.

A. The years are all shown there.

Mr. Taylor: They are all shown?

A. Yes sir.

The Court: They are shown.

Mr. Taylor: I would like to have her point out the year please.

A. Here is 1956 (indicating); then January 1957 (indicating), and so on to 1958. Those are 1958 (indicating).

Mr. Taylor: You would have to be a mind reader.

A. These are all in chronological order. At the beginning of each year we stamp them for the new year. There is a stamp here at the beginning of 1957, and a stamp at the beginning of 1958 and all

(Testimony of Elaine Patterson.)
of these entries here are for 1958 and carried through. [356]

Q. (By Mr. Hermann): Would you like to put '57 and '58 there?

A. Yes, if you would like me to.

(The witness marked the exhibit.)

The Court: Now you are asking the witness to alter records, an original record; but if it is your request I suppose it is all right. You are asking her to add the date. I think she testified this date is shown once each year. Was it at the head of the column?

A. At the side of the column.

The Court: Very well. It matters not. The exhibit may be received in evidence.

(A bookkeeping card is received in evidence as plaintiff's Exhibit Y.)

Q. (By Mr. Hermann): Now, Mrs. Patterson, where is the first indication of a payment on this exhibit, plaintiff's Exhibit Y?

A. That would have been the one we received in our office December 7, 1956.

Q. Can you state what was the amount of that payment?

A. The amount of that payment was $1,500.00.

Q. Can you state whether or not that payment was timely, past due or in advance?

A. It would have been—most of it was past due. However, it paid a portion of the premium payment for—let's see—it would have been the [357] January payment.

(Testimony of Elaine Patterson.)

Q. In other words, this was the first payment that you received.

A. This was the first payment we received.

Q. And I believe you testified Sept. 3, 1956, was the date of the original policy? A. Yes.

Q. When was the next payment made?

A. The next one was February 14, 1957.

Q. How much was that? A. $175.00.

Mr. Taylor: If your Honor please, for the purpose of saving time, I believe instead of this—the exhibit speaks for itself. Let the United States Attorney read it to the jury. It is going to be admitted——

The Court: Again that is the privilege of the United States Attorney. It is not up to you or me to tell the United States Attorney——

Mr. Taylor: I was just making a suggestion that might save some time. I was trying to be helpful.

The Court: It is up to you. If you wish to read that to the jury you may do so.

Q. (By Mr. Hermann): Under item of credits in column 2 of the columns of figures, on 2-14-57 payment was made of $1,500.00. This is the first payment, the first credit in this column? [358]

A. That was 12-7-56.

Q. On 2-14-57, February, another payment of $175.00 was made, and on 2-23-57 a payment of $300.00 was made by check?

A. That is correct.

Q. On 4-4-57, which would be April, or two months later, a payment of $463.51 was made, and

(Testimony of Elaine Patterson.)

on 5-29-57 a payment of $245.00; on 6-3-57 a payment of $589.16 was made? A. Yes sir.

Q. On 8-8-57 a payment of $1,000.00 was made and this one I would like you to explain.

A. That is August 8. The payment was a payment in advance for the down payment on renewal of the coverage for the year 1957 to 1958.

Q. Not on the previous policy?

A. No. The previous policy for 1956 to 1957 had been paid for and at this time this was an advance payment for renewal on the renewal of the insurance coverage for the new year, and that was a thousand dollars.

Q. Then continuing in the credit column for the payments, there is three blank days, and another payment of $1,000.00 on Nov. 5, 1957, by check was made. And then another payment on Jan. 15, 1958 of $314.75——

A. Those were credits, I believe for the return premium.

Q. What would be the last payment?

A. The last payment would be the $1,000.00 check. See—here are two items, check items, one in August and one in November——

Q. I see. During the first year of the policy was the payment generally made in advance? [359]

Mr. Taylor: Just a minute, your Honor. I am going to object. It's incompetent, irrelevant and immaterial. I believe that exhibit speaks for itself.

The Court: That is probably true. The witness said the exhibit shows the charges accrued and then

(Testimony of Elaine Patterson.)

it shows the credits. Then I would think the exhibit shows for itself.

Q. (By Mr. Hermann): Does the exhibit show whether the policy is paid to date at any given entry?

A. No sir. Not until the final one here of June 3, 1957, since it was on a final one, and that doesn't actually reflect in here. It was paid at the time of June 3, 1957.

Q. The final payment of the year?

A. That's right sir.

Q. Well, I would like to ask then, was it usual during the year of 1956-1957, the insurance year, whether it was generally or usually paid in advance or usually behind in payment?

The Court: I think the exhibit shows the circumstances here.

Mr. Hermann: She testified that it didn't.

The Court: That it did not show for itself? I couldn't quite get what you meant. Very well then. She may answer, if the exhibit does not show for itself.

Mr. Taylor: Just a moment. I am going to object, because the exhibit does show for itself. It shows the man got $946.99 refund after cancellation. [360]

The Court: May I have that exhibit. I don't pass on the weight; again, I merely pass on whether it is proper.

(The Court examines the exhibit.)

It seems to me, Mr. Hermann, that this exhibit

(Testimony of Elaine Patterson.)
does speak for itself. It shows the dates of charges, according to the entries—as I understand it, and then it shows the date upon which credits were received, payments against these charges, and the balance. Why doesn't it speak for itself? May I see it again?

(The exhibit is returned to the Court for further examination.)

Objection then will be sustained.

Q. (By Mr. Hermann): Mrs. Patterson, in the event of a total loss by fire, is the amount of the policy necessarily the amount that is paid to the insured person?

Mr. Taylor: Just a minute, your Honor, I think that is a matter of the policy itself. I think it's a part of the contract between LaBow Haynes and the defendant. I think if the contract shows it I think that's the way to do it, not to go by what she believes it would show.

The Court: If the contract of insurance reflects the matter of how loss payments are adjusted and paid then she may not say orally.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Taylor): Mrs. Patterson, how long have you been in the insurance business?

A. About eleven or twelve years, I would say.

Q. Has that experience been in Anchorage?

A. Four years of it has been here; four years in our Seattle office, two years of that time working with the Anchorage agency.

(Testimony of Elaine Patterson.)

Q. How long has LaBow Haynes Company been in business in Alaska?

A. Since 1949, I believe it is.

Q. And that Company has a lot of agencies in the west? A. No sir.

Q. How many?

A. Seattle and this office are the two LaBow Haynes Company offices.

Q. Now Mrs. LaBow—I mean Mrs. Patterson, calling your attention to plaintiff's Exhibit Y, now that shows the payment, the credits and payments on this policy from, I believe, the time they were first issued? A. Right sir.

Q. Did you ever object when Mr. Salinas was behind in his payments?

A. Yes, I wrote to him.

Q. You would send him a bill, would you?

A. Yes sir.

Q. Then he would send you some money?

A. Part of the time, yes.

Q. I believe you said you put the policy under a contract in which he was to pay the equivalent of some four hundred or some three hundred, or $244.00—$244.58.

A. I believe $244.58 were the monthly payments, yes.

Q. Isn't it a fact, Mrs. Patterson, that you carry many of your customers in the same similar manner that you carried Mr. Salinas? [363]

A. No, I wouldn't say so.

Q. What? A. No, I wouldn't say that.

(Testimony of Elaine Patterson.)

Q. You were satisfied then, after your first year of experience with Mr. Salinas, that you renewed his policy for another year? A. Right sir.

Q. Evidently your business relations with Mr. Salinas were satisfactory?

A. Yes. He paid the premiums eventually, although there were delinquencies in the payments.

Q. Did you realize that at times much of the year's business was a little slow?

A. Under the contract payments are still due, however.

Q. But you say that you did not go by that contract that you put into evidence here. You say that was assumed by you?

A. Yes. We sent him statements, though, on this basis.

Q. On this basis? But you say this was not put into effect? A. Not with the bank.

Q. This doesn't mean a thing then, does it?

A. Except that he agreed to make those payments in there.

Q. Have you got the contract?

A. Not with him.

Q. You have no contract with Mr. Salinas but you have this contract with the Alaska Bancorporation, is that right?

A. He has that, which is what he signed his name, to make certain payments. The payments were not made in advance and up to date, so at no time could we actually put it through the bank, because the payments were not [364] made up to

(Testimony of Elaine Patterson.)

date. Until such time as the policy continued long enough we couldn't. And we have to have a down payment and any monthly payments which would be due, and any payments which would be due ten days prior to the time of the next payment before we are able to enter that with the bank.

Q. But this contract was never in effect that was written, was it? A. No sir.

Q. Now what was the premium on those risks of Mr. Salinas at Kotzebue? What was the premium rate?

A. It would be in the records; I don't know.

The Court: Are you speaking of two different things, counsel?

Q. (By Mr. Taylor): I want the premium rate.

A. The rate or the premium—well, it would be on the policies—I don't remember what the rate is. It is the regular published rate.

Q. Published where?

A. That is in the Miscellaneous Rate Book for Alaska as put out by the Fire Rating Bureau. We don't have the Rate Book here.

Q. What rate is in the insurance policy?

A. The rate for the first year was $5.44 as building and equipment, and $6.06 on the stock coverage. That is per hundred dollars of value. And at 16c for extended coverage insurance, and that applies to the total amount.

Q. 16c you say?

A. Yes, for extended coverage.

Q. Just for the benefit of the jury, would you explain to the jury what that is? [365]

(Testimony of Elaine Patterson.)

A. It would be coverage by reason of storm damage, hail, windstorm, explosion, motor vehicle damage, aircraft damage, motor vehicle damage, running into a building, riot, civil commotion. I think those are the main portions of it.

Q. Then if he had a loss from any other cause than actual fire—say the building caved in from heavy snow.

A. There would be no coverage for that.

Q. He would be paying a premium of $6.22, would he not? A. Per hundred.

Q. Per hundred? A. Yes.

Q. Then the following year how much insurance was carried? A. A total of $50,000.00.

Q. How much? A. $50,000.00.

Q. Then the renewal was at the same rate?

A. No. The rate for the second year was $4.67 for the building and equipment.

Q. What?

A. $4.67; and $5.20 on stock; and the extended coverage was .137.

Q. The extended coverage went up then?

A. No. It went down. It was 15c before and on the renewal it was .137.

Q. .137. Then by reason of your favorable experience over that first year, then, you got a reduction?

A. No. That is normal with the policies and the annual renewal endorsement on the policy, which reads "In consideration of the premium, and the [366] stipulations, terms and conditions of the pol-

(Testimony of Elaine Patterson.)
icy to which this endorsement is attached, it is agreed that the insured shall have the option to renew this policy annually for .... successive years, pursuant to the terms of the forms then current, by the payment of a premium calculated at nineteen point five percent for fire and at nineteen point five percent for all other perils insured against, of the then current five year term rate—" and so forth.

Q. That's a reduction by endorsement——

A. It's a normal endorsement.

Q. Then the average would be the same?

A. Not necessarily, because it is based on the then current five year term rate. In the event the rates or term rules change, then changes occur in the rates.

Q. Now when you came to Kotzebue—I believe you did go to Kotzebue—did you not? A. Yes.

Q. You inspected the risk?

A. No sir. I was at the building but I didn't inspect the risk. I mean I had a meal there and talked to him.

Q. When did you go to Kotzebue?

A. It was Labor Day, which I believe was September 3 of 1956.

Q. Did you see Mr. Salinas there?

A. I did.

Q. You were not interested in the risk while you were at Kotzebue?

A. I am not qualified to judge a risk. He had asked to place a certain amount of insurance and that was the amount I placed. [367]

(Testimony of Elaine Patterson.)

Q. Took no pictures of it? A. No sir.

Q. And that renewal was the same amount? $50,000.00? A. Right sir.

Q. Now then, on January 3 of this year you wrote a letter cancelling Mr. Salinas' insurance?

A. Cancellation notices are sent; those are standard forms. Right sir.

Q. Was that by reason of the fact that he had suffered a small fire on Christmas Day of 1957?

A. I was requested to have the policy cancelled by Mr. Dimock, who is the Manager of the office. I don't know what his particular reasons were for it. He asked me to have them cancelled.

Q. Then what was the effective date of that cancellation?

A. An effective date—you have to give ten days notice. You have to give ten days notice to a mortgagee on the policy, plus the normal time for a letter to arrive at the destination, which we normally allow two days for.

Q. Did you realize there was no mortgage on that place, although you wrote to Mutual?

A. No sir. We had not been advised of that fact.

Q. The mortgagee had not advised you?

A. Well, the assured normally advises us. However, we were never advised by either the mortgagee or the assured.

Q. Was the total amount payable to the mortgagee? A. Total amount of what?

Q. Of insurance if loss occurred? [368]

A. No sir. Under "as therein many appear——"

(Testimony of Elaine Patterson.)

Q. As therein would appear, yes.

Now as the exhibit shows here (Exhibit V), this letter to Mr. Salinas indicates, to LaBow Haynes rather, indicates that Mr. Salinas was just notified within the past few days of this. Now isn't it a fact that since you gave that notice on January 3, 1958, that the policies had been cancelled that Mr. Salinas paid to your firm something like fifteen or sixteen hundred dollars?

A. I don't understand your question sir.

Q. Well, you gave a notice stating that the insurance would be cancelled on the 15th day of January, 1958. You have since collected about fifteen hundred dollars from Mr. Salinas?

A. No sir, we have not. These are the return premiums which were allowed (indicating on Exhibit Y). The last check we received was on November 5. These are return premiums which are also credited to his account. This is the amount credited to him; this credit column. These all go to his account.

Q. Well, if he had a credit of that amount, why is it he received only $946.99 back.

A. He paid us altogether $2,000.00, and we allowed him return premiums for the unearned portion of time the policies were in effect, and then have remitted a check for the balance which would be due.

Q. How many months was that insurance in effect?

A. Well, let's see, from September 3 to January

(Testimony of Elaine Patterson.)
15, that would have been a little over four months.

Q. So then what was the total yearly premium from 1947 to—from 1957 to 1958?

A. The total amount of the premium was $2,-583.11.

Q. $2,583.11. So then he had insurance in effect four and a half months and he got back $946.00 then, is that right?

A. Yes. That was the amount of the check we gave to him.

Q. Then for that four and a half months you charged him $1,627.00.

A. Whatever the balance is. I don't know what it would amount to.

Q. Do you know whether or not any adjuster has ever been sent to Kotzebue to adjust the loss that there was notification of?

A. Not to my knowledge. We haven't to my knowledge. We haven't been notified by letter from the assured. The first notification we had was from you.

Q. You introduced in evidence here a letter which indicated you had heard about the fire.

A. That you had written to us advising us of the fire.

Q. Do you know whether your Company in Anchorage made an adjustment?

A. We had sent, at your request, a proof of loss form to you. Now those would have to be submitted to us. I don't know whether that has been done or not.

(Testimony of Elaine Patterson.)

Q. I just got them. I brought them here the other day.

A. They were sent on April 7.

The Court: Counsel, of course you shouldn't testify without being sworn. Perhaps there would be no objection to that. [370]

Q. (By Mr. Taylor): So I take it now, Mrs. Patterson, from your statements, that no proof of loss has been filed up to date?

A. It hadn't at the time I left Anchorage.

Q. It had not at the time you left Anchorage on Saturday morning? A. No sir.

Q. Now at the time you were at Kotzebue isn't it a fact that you were asked, your Company was asked by Mr. Salinas to have an estimate made as to the value of the building, stock and fixtures?

A. No sir, I don't believe so. Not to my knowledge.

Q. Not to your knowledge?

A. No sir. We don't normally do that. We don't send anyone out, especially in those areas, and we don't do it even in the Anchorage area.

Q. A policy of $50,000.00 at a fairly remote distance, you were more interested in the premium than you were in the loss, is that correct?

A. We had been requested to place a certain amount of coverage and that is the amount we placed for the assured.

Q. That's all.

The Court: Will you have any redirect of any length, counsel?

(Testimony of Elaine Patterson.)

Mr. Hermann: None of any length. Possibly only one or two questions.

The Court: We could take a recess, but do you have any questions?

Mr. Hermann: I believe I have none at all.

(There were no further questions and the witness was excused from the stand.) [371]

(Thereupon at approximately 4:15 p.m. court recessed for ten minutes, the jury being duly admonished.)

After Recess

(Both counsel stipulated as to the presence of the jury, and all other necessary persons being again present, the trial of the cause was resumed.)

The Court: Very well. We may proceed.

CHARLES MILLS

is then called and sworn as the next witness for the plaintiff, and then testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Mills, would you tell the Judge and jury your name.

A. Charles E. Mills.

Q. What is your business or occupation at the present time?

A. I operate the Nome Pool Hall.

Q. Do you know the defendant Steve Salinas?

A. Yes sir.

Q. Have you ever at any time had any business

(Testimony of Charles Mills.)
dealings with Mr. Salinas? A. No sir.

Q. Have you ever at any time corresponded with him? A. Just one letter is all.

Q. When was that?

A. I don't know when it was; last month sometime.

Q. Would that be the month of March?

A. Yes, I guess so. [372]

Q. What was the letter in reference to?

A. Well I just asked him if he——

Q. Go ahead.

A. I just asked him if he would lease me the place he had over there or sell it on terms.

Q. Do you have a copy of that letter?

A. No.

Q. Did you receive any reply from that letter?

A. Yes.

Q. When did you receive the reply?

A. Well that was last month too, sometime. I don't know.

Q. Where is that reply now, do you know?

A. No. I guess it's in the garbage dump, I guess. I never keep those things. He wasn't interested in my proposition so I just threw the letter away.

Q. Could you tell us what the letter said?

Mr. Taylor: Just a moment. I am going to object, your Honor. It wouldn't be the best evidence, and it's incompetent, irrelevant and immaterial, a letter written in March of this year.

The Court: It's not too remote, counsel. Of course the witness may testify to the contents of

(Testimony of Charles Mills.)
the letter or document if it is shown that it is destroyed, and that is what I understood him to say. It is not the best evidence, but it may be done.

Mr. Taylor: Yes, your Honor, but coming after the fire, not before the fire? [373]

The Court: That is true, but it is not too remote. Three months is not too remote, I would say.

Q. (By Mr. Hermann): Would you tell us what——

Mr. Crane: If your Honor please. May I address your Honor. I would like to have the jury excused until we finish the contents of this letter. It may be highly prejudicial; if it is admissible then it can go to the jury.

The Court: Very well. The jury may retire to the jury room.

(The jury leaves the court room and retires to the jury room.)

The Court: Now perhaps we could have this offer of proof out of the presence of the jury. Would you state what you expect to prove.

Mr. Hermann: I expect to prove that Mr. Salinas offered to sell the Kotzebue Grill for the sum of $10,000.00. I believe there was evidence from the expert to the amount of damage. In figuring the amount of damage, the figure of $10,000.00 would relate back to the value of the building before the time of the fire.

The Court: Somebody, Mr. Harkabus, I believe, did testify as to the estimate of loss. What was it?

Mr. Hermann: It was between $2,000.00 and

(Testimony of Charles Mills.)

$2,500.00 damage. So I believe it would relate then, though subsequent in time, to the value defendant placed on it.

Mr. Taylor: If your Honor please, I do not believe that this [374] offer at this time would be of any value, any evidence of value. The business is necessarily deteriorated over the period since it was hurt. Furthermore this defendant has been out of business since the loss. He went outside to Seattle on an income tax case which cost some $16,000.00.

The Court: There is no evidence of that sir.

Mr. Taylor: There is no evidence of that but this is an offer of proof, and we will prove this, your Honor.

The Court: Counsel, circumstances such as you just mentioned may be offered in rebuttal or even on cross examination, if known with reference to the fact that the business has since been closed; The amount of actual damage—those factors which may be considered. But does that destroy the fact that testimony may be offered? If it is a declaration by the defendant himself in which he places a value on this property, it is not too remote from the fire.

Mr. Taylor: I am going to contend that it is too remote. A forced sale and a person——

The Court: A forced sale? I heard no such suggestion, counsel.

Mr. Taylor: We asked to excuse the jury so we could show just what we could expect to prove.

(Testimony of Charles Mills.)

The Court: What you expected to prove by this witness.

Mr. Taylor: Yes, but which we would also expect to be shown in rebuttal was a compromise.

The Court: Now, counsel, you surely do not contend that we may not admit this because you may not rebut? [375]

Mr. Taylor: I don't think we would have to rebut it.

The Court: Why is it not admissible three or four months after? According to your argument, counsel, the Court should reject this testimony because you can rebut it. Is that a valid argument, or reason?

Mr. Taylor: The letter would be the best evidence.

The Court: We have already talked about that. Call in the jury. The objection will be overruled.

(The jury returns to the jury box.)

The Court: The witness was asked to state to the best of his recollection the contents of the letter received from Steve Salinas. You may answer that as far as you can remember, Mr. Mills.

A. It was very short and brief. He wouldn't care to lease or sell on terms.

Q. (By Mr. Hermann): What else, if anything, did he say?

A. Didn't say anything else. Just signed his name.

Q. Was any figure mentioned?

A. No sir.

(Testimony of Charles Mills.)

Mr. Crane: We object, your Honor. It's leading and suggestive. He said it was very brief. He already answered the question, your Honor. He said he wasn't interested in leasing or selling.

The Court: I fear the question may be leading. Objection sustained. You may ask him again to the best of his recollection [376] whether there was anything else in the letter, but you must not suggest the answer.

Q. (By Mr. Hermann): Was there anything else in the letter, Mr. Mills?

A. Nothing else.

Q. Did you ever receive any other letters from Mr. Salinas? A. Never.

Q. No further questions.

Mr. Taylor: No questions.

(There were no further questions and the witness was excused from the stand.)

Mr. Hermann: At this time I would like to introduce an official document.

(A document is shown to defense counsel.)

Mr. Crane: If your Honor please, we will have to take a little time to examine this because I think I have some other papers in my file that pertain to this. Either I have them or Mr. Salinas has them, because they were shown to me last evening.

(After a short interval.)

The Court: Have you examined it counsel? If you are finished with it, I would like to see it because I have no idea what it is all about.

(The document is handed to the Court.)

(Counsel approach the bench out of hearing of the jury and the reporter.) [377]

The Court: Well, we had best excuse the jury again while we discuss the admissibility of this. Will you please retire again. I am sorry, ladies and gentlemen.

(The jury again retires to the jury room.)

The Court: What is offered here apparently is a certified copy of a notice of tax lien under the Internal Revenue laws, filed December 5, 1957. The instrument seems to be properly certified by the United States Commissioner for the Noatak-Kobuk Precinct and bears also the certificate of the Clerk of this Court certifying that Alfred G. Francis is the recorder for such precinct. So it may be admissible under our statute so far as its authenticity is concerned. But the question which bothers me is as to its relevancy. I presume you are offering it to show that the defendant on December 5 was in trouble financially on account of the tax lien and therefore to show motive. Is that it? I am asking Mr. Hermann first.

Mr. Hermann: Yes sir. This is the first day I didn't bring my books down—but I have found a case where evidence of taxes and other cases where evidence of financial difficulty has been allowed to be shown to show motive for intent for the crime of arson.

The Court: Now then, Mr. Crane?

Mr. Crane: If your Honor please——

Mr. Hermann: I would also like to point out

that it relates very closely in point of time.

Mr. Crane: In answer to the last statement, point of time, this [378] is a lien filed in Texas, down there after he was down there. It was filed in Texas, I believe in the District at Austin.

The Court: It was filed in Kotzebue. Well, I believe it issued out of the Texas office, did it not?

Mr. Hermann: I believe they sent it up here.

The Court: It is out of the Texas office; but what difference does that make?

Mr. Crane: If the Court will indulge me just a minute, I take the position that it is highly prejudicial, first, for this reason; I have, either in my file or in my office, at least I did have the night before last, a release of this particular lien in question prior to the fire. The release came in a few days ago. This has only been settled very recently and if we have to go into this and show the circumstances surrounding it, the releasing of this lien, it is going to take some time to show how we did clean this lien up. But the lien has been satisfied.

The Court: That's the very thing the Government wishes to show, motive, financial difficulties existing at the time of the fire. This was the fifth of December, which is 20 days prior to the fire. Rather a substantial amount, over $7,000.00.

Mr. Crane: He hasn't collected any insurance to pay it though. He hasn't even claimed any insurance.

The Court: Well a satisfaction of lien just recently through borrowed money or something——

Mr. Crane: I don't know how recently. I only received it, the [379] satisfaction, a few days ago. It was mailed to Mr. Salinas and forwarded to him and then forwarded down here, in my care. I can't state to the Court the exact date of the satisfaction of lien until I examine it. It would naturally take me a few minutes to put my hands on it. I thought I had it in my file in court.

The Court: Well, if it was not satisfied on December 25 I cannot see what difference it would make for the purpose for which the exhibit was offered. It is purely a circumstance and if it is valid the fact that it is prejudicial does not render it the less so. All evidence against a suspect is prejudicial. My duty is to determine whether it is legal.

Mr. Taylor: I take it then that the Court's ruling——

The Court: I haven't ruled on it yet. I am thinking I would like to see that case. Such a decision would be helpful.

Mr. Hermann: It would take me but a minute to look it up, at the most.

The Court: I would prefer to have such authority. As I say it sounds quite logical. Do you have any other witnesses?

Mr. Hermann: I hadn't planned on any more. I have to make one last minute check. But I don't believe at this time there will be any further witnesses.

The Court: You intend to rest after this?

Mr. Hermann: I believe so.

The Court: Well how long would it take you to find that case?

Mr. Hermann: It's in the book sitting on my desk, and I have [380] a bookmark in it I believe.

The Court: Well, if you expect to rest, at this time suppose we take a recess for five minutes while you procure this. I am inclined to believe that you are correct but I should like to be sure.

(The jury having previously retired, court recessed for approximately five minutes at 4:45.)

After Recess

(All persons required to be present were again present.)

The Court: The record may show the jury is still absent. I am cited upon this offer of a tax lien to a text, a treatise on the law of arson by Arthur F. Curtis of the New York Bar, which is not very new, but yet the law of arson is also quite old. In this it is stated in connection with proof of insurance, and bearing upon the defendant's motive in an arson case, that the state may prove evidence of financial condition, that evidence of financial condition is competent. Thus the prosecution can show at the time the bank account of the accused was small, that he had various checks returned unpaid, or also that the defendant was delinquent in payment of taxes or rent may be disclosed. It goes on to other demands of creditors that may be shown. That seems to be in accord with the general rule which I had noted previously in discussion of the

law of arson in 4 Am. Jur. that the existence of motive, [381] although not necessary to be shown in arson cases, is competent to be shown. And that, surely, is the law. Therefore, I think that the position of the United States Attorney is correct, and that this exhibit may be received as bearing upon the matter of intent or motive. It has not yet been offered, but if you will call in the jury it may be offered in the regular course.

(The jury then returns to the jury box.)

Mr. Hermann: If your Honor please, I would like to offer in evidence an official document, recorded by the recorder for the Noatak-Kobuk Recording Precinct.

Mr. Taylor: To which we object, your Honor, and what we would like to do is reserve argument on this until tomorrow morning, your Honor, subject to Mr. Hermann's resting. If you would like to hold that until tomorrow I would like to bring some authorities in on this, on short notice.

The Court: Well, I have already ruled upon this out of the presence of the jury. I will tell you—it may be received but it may not be given to the jury at this time. And if you can convince me that I am wrong, I will reconsider the ruling made a few moments ago.

Mr. Taylor: Yes, your Honor.

The Court: Very well. The exhibit may be received but may not now be read to the jury. [382]

(A certified copy of notice of tax lien is marked for identification and received in evidence as plaintiff's Exhibit Z.)

Mr. Hermann: But it may not yet be read?

The Court: No. We will hear from counsel further on this subject, if you wish, in the morning.

Mr. Hermann: If your Honor please, I would like to recall Mr. Mills to the stand. It won't take long.

CHARLES MILLS

is then recalled recalled to the witness stand, and having previously been sworn, testified as follows:

Q. (By Mr. Hermann): Mr. Mills, did you state whether or not you have talked to the defendant Steve Salinas since the time you mentioned that you received that letter from him?

Mr. Taylor: Just a minute, your Honor, we are going to object to the recall of a witness after he has already once been sworn and examined and excused, and then he comes back in here and he wants to recall him.

The Court: That is surely in the discretion of the Court, as you well know. The Government has not yet rested. He may answer.

A. Well now, I went to Kotzebue and I went up to his room and asked him for the key and gave it to me and I went and looked at the place and went. I [383] didn't say three words to him. I said "hello", "May I have your key", and when I took the key back I didn't even take it back to the man himself. I gave it to the man that helps Mr. Salinas around there.

Q. And have you seen Mr. Salinas since that occasion?

A. I just saw him around in town here.

(Testimony of Charles Mills.)

Q. Did you talk to him when you saw him in town?

A. When he was in the place he just said "hello", and I said "hello, Steven".

Q. Did he say anything to you?

A. No sir.

Q. Did he in any way mention the correspondence?

Mr. Crane: I object, your Honor. Leading and suggestive, and an attempt to cross examine his own witness.

The Court: The witness has answered "Did he say anything to you?" and he answered "No". Therefore, the witness is apparently adverse. However, and the Court is going to notice that, if a witness is adverse, counsel may inquire a little further. That is permitted.

Q. (By Mr. Hermann): Mr. Mills, when you talked to Mr. Salinas in town here, was there any mention made by either of you of a sale of the Kotzebue Grill? A. Not a word.

Q. Did he ever offer to sell the Grill to you?

Mr. Taylor: Just a minute, your Honor. I think the question has been asked and was answered. It's repetitious and I believe improper cross examination of his own witness. He hasn't been a hostile witness. He has just answered the questions he has been asked truthfully. [384] That doesn't make him a hostile witness, your Honor. We object to it.

The Court: I find the witness is adverse and he may therefore be subject, not to cross examination,

(Testimony of Charles Mills.)

—certainly not—but to more or less leading questions. You may answer that question.

A. Just the time I told you. In March I guess it was. He didn't offer it to me then. He said he had it for sale and I asked him what he would take for it.

Q. (By Mr. Hermann): What did he say?

A. He said he would take $10,000.00.

Mr. Hermann: No further questions.

Q. Oh, just a moment——

Was that for the Grill only, Mr. Mills?

A. Yes sir, that is all.

Q. Now wait a minute. We had better clarify that. Tell us what you mean,—the Grill building or what?

A. I didn't say nothing about the Grill; I was talking about the whole property.

Q. What property?

A. I mean the place he has over there.

Q. What place is that?

A. Well, I don't even know what the name of it is.

Q. What kind of a building is it?

A. A restaurant and some rooms upstairs I think.

Q. No further questions. [385]

Cross Examination

Q. (By Mr. Crane): Where did this conversation take place?

A. Right in the pool hall here.

(Testimony of Charles Mills.)

Q. When?

A. Well, I don't know; sometime in March.

Q. Did you accept the offer?

A. Did I accept it?

Q. Yes.

A. Well no, because I didn't say anything; when I made the trip to Kotzebue I went over to look at it.

Q. What I am getting at, that offer was just for the building alone, not for the stock or merchandise?

A. I didn't have no use for the stock or anything else in there.

Mr. Crane: That's all.

The Court: Well, I guess that's all then.

A. O.K.

(There were no further questions and the witness was then excused.)

The Court: That concludes our session for the day. Do you wish to rest at this time?

Mr. Hermann: I would rather adjourn than rest at the present time.

The Court: Very well. We will resume this case in the morning.

(Thereupon the Court duly admonished the jury and the session and court were adjourned for the day.) [386]

Be Is Remembered that at 10:00 a.m., on April 25, 1958, Court reconvened and the trial of this cause was resumed. All counsel and all other neces-

sary persons were again present; the defendant also being personally present. Both counsel stipulated as to the presence of the jury.

The Court: Thank you. The defendant also being present we can proceed with the case. However, there is an Ex Parte matter that is directed to my attention. I will ask the Clerk to enter a minute order calling a special term of the Court to be held at Gambell on St. Lawrence Island on June 5 at 2:00 p.m. and that notice be given accordingly. I do not think we need to specify the purpose, but if so, it will be for the purpose of a naturalization hearing.

We will proceed then, with the case of United States vs. Salinas. At adjournment last evening opportunity was given the defendant to be further heard on the admission by the plaintiff of plaintiff's Exhibit Z. Do you wish to urge that, Mr. Crane?

Mr. Crane: No, your Honor.

The Court: That the Court's ruling is correct. Well, good. The exhibit has already been received in evidence but if you wish it may be read to the jury.

Mr. Hermann: I would like to read it to the jury.

The Court: It is understood that this exhibit is admitted purely on the question of intent or motive.

(Plaintiff's Exhibit Z is then read in its entirety to the jury by Mr. Hermann.) [387]

(At the conclusion of the reading of Exhibit Z the Government rested its case.)

Mr. Taylor: If your Honor please, we would re-

quest at this time that the jury be excused for the purpose of making a motion out of the presence of the jury, and perhaps arguing the motion also.

The Court: Very well. The jury will please retire to the jury room. If we find the time required is extensive at all, then you may be excused, but I do not know at this time. If you will just please wait in the jury room.

(The jury then retires to the jury room.)

Mr. Taylor: If your Honor please, at this time we will move the Court for an order entering a judgment of acquittal in Count No. 1 of indictment in No. 1642, criminal. We also make a motion for judgment of acquittal of the crime charged in Count No. 2 of indictment in No. 1642. The grounds of both of these motions, your Honor, is that there is not sufficient evidence to prove the res gestae of the crime in either count; that there is a total failure of proof of the essential elements of Count 1 in that there is no evidence of any kind or nature, your Honor, to connect the defendant with the malicious, wilful setting of a fire to a dwelling house. Furthermore, your Honor, another ground is that the dwelling house, that there was no dwelling house, that it was a business house which for some time had not been a dwelling house.

On the grounds of Count 2, since there was no wilful setting of [388] a fire by this defendant there could be no intent to injure or defraud an insurer. We feel both motions, your Honor, should be granted upon the grounds stated.

We also, at this time, make another motion, that

at this time the Government be required to elect upon which count they are prosecuting the defendant.

The Court: I have, of course, anticipated both of these motions and thoroughly considered them. I do not think I need to hear from the United States Attorney on them.

With respect to the first motion to dismiss, or for judgment of acquittal on the ground of failure of proof, there does appear to be ample evidence at this to submit to the jury as to the res gestae, as to the crime of arson having been committed. There is evidence to connect the defendant with the crime. Now it is possible that there is doubt which may be resolved on that question, but I feel any such doubt should be resolved by the jury. The evidence, of course, is purely circumstantial, which is true in almost all arson cases. Seldom, if ever, is any person caught in the act of a wilful or malicious arson. I will not detail it here, but there is evidence with respect to motive, with respect to admissions made by the defendant, that the fire was set, although denying that he did so and seeking to imply that someone else had done it; as to his attitude at the time of the fire, as to which there was a conflict of evidence. Some witnesses said he helped not at all, some said that he did. All of those things I think are sufficient to [389] sustain a prima facie case, and therefore to go to the jury.

I would like to direct counsel's attention particularly to a decision of the Circuit Court of Appeals for the Ninth Circuit sustaining a ruling of

the court denying a similar motion in the case of Zamora vs. United States, 112 F. 2d 631. Of course any such motion must be determined upon the facts of each such case. But I believe the facts here established in this case are at least as sufficient as in the case cited, to justify the Court in submitting the case to the jury.

And also as to the second count, the crime of burning with intent to defraud, in the same manner counsel's attention is directed to a decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Peters vs. United States, 97 F. 2d 500, likewise affirming a decision of the District Court for the First Division, holding the evidence sufficient under such charge.

Again I feel that the evidence here is equally sufficient to that in the cited case.

With respect to the dwelling house, the law is clearly established that a building may be a dwelling house, even though occupied for other purposes, if any room or rooms in the building are ordinarily occupied as living quarters, which is a dwelling. It has even been held that one room is enough. One case goes even further than that and holds that a jail is a dwelling house where the jailer resided in it, and similarly that a school is a dwelling house where a school teacher lived in a room in the building. So it cannot be [390] said merely because this building was occupied by the Kotzebue Grill as a restaurant that it could not be said to be a dwelling house within the meaning of the statute, where two rooms had been so occu-

pied. Now, again, the question has been raised as to whether or not such occupancy had been abandoned. Under our statute the fact of non-occupancy makes no difference, as counsel's attention was directed at the time of hearing of the motion on this point—I beg your pardon—on the ruling on the question of admissibility of evidence or relevancy of it. I feel that where the evidence on that point is conflicting, such question must be put to the jury. And as an authority for that statement I cite particularly 4 Am. Jur. on the subject of arson, Sec. 13, page 93. Under our statute in Alaska, however, a further question arises. Defendant is here accused by indictment in Count No. 1 of the crime of arson in the first degree, which relates to a dwelling. Now, originally, at common law, arson was limited to a dwelling. It has been extended by statute in most states, and also Alaska, to include the burning of other types of buildings. But under our statute, under Sec. 65-5-2, a burning of a building wilfully, maliciously, is defined as arson in the second degree. Now in any case where there are different degrees of a crime, and there is evidence, or conflicting evidence, it is the duty of the Court to submit to the jury the lesser offense, and I believe that should probably be done in this case; that the jury should be instructed that if they find that the property here involved was not a dwelling under the proper definition, which I will endeavor to give to the jury, they then may find the defendant [391] guilty of the lesser offense of arson in the second degree. Therefore the jury may determine that question.

With respect to the motion to elect, I have also given a good deal of consideration to that question. Evidently the motion depends on Rule 14, FRCP, which provides that the Court may grant relief from prejudicial joinder by severance or a motion to elect, where the Court finds that joinder of counts is prejudicial to the defendant. Now all of the authorities hold that this question is one in the discretion of the Court, and that that discretion exists if the facts alleged in each of several counts constitute different grades of the several offenses, which certainly is true here. Well, not precisely true. They are all related together in the statute, but strictly speaking the second charge does not charge arson, but is a related crime to arson, being a burning with intent to defraud the insurer; and also that such joinder is proper and that election may be refused in the discretion of the Court, where the count constitutes different crimes but relate to and form a part of the same transaction, and that definitely appears here. These two counts are so related that evidence as to the second must necessarily include evidence as to the first. Therefore it certainly is not prejudicial to the defendant to try to the jury both of such offenses rather than require the defendant to submit to separate trials on the same facts and the same evidence, which indeed then would be prejudicial. I would direct counsel's attention particularly to the case of Finnegan vs. United States, Circuit Court of the Eighth Circuit, 2004 F. 2d 105, in which the Court reviews this very [392] question

and holds that if the charges are of the same general character or belong to the same class, and where the evidence of one relates to the other, and the Court finds that they are joined in good faith, the Government should not be required to elect. And likewise the case of Tinkoff vs. United States, Circuit Court of Appeals, Seventh Circuit, 86 F. 2nd 868, in which the same question was reviewed in an arson case. No, I beg your pardon, it is not an arson case. But it is one in which the Court holds precisely as in the Finnegan case; where the offenses charged were of the same class and involved closely related subject matter and that the joinder is proper. Refusal of the Court to require an election was upheld. Similarly, and this I think is an arson case, the case of Pointer vs. United States, 15 U. S. 396. Other cases too, I have reviewed, but these are the most clearly in point.

Therefore, I find that it is necessary for the motion for judgment of acquittal as to both counts must be denied, and the motion to elect must likewise be denied.

You may call in the jury.

Mr. Taylor: If your Honor please, we would like to argue this. We have done quite a bit of research, quite a bit of work——

The Court: I thought you had finished. I am sorry—I thought you had finished, Mr. Taylor. You did not indicate you wished to be heard further.

Mr. Taylor: I have prepared a brief.

The Court: When you took your seat I assumed you were finished. [393]

Mr. Taylor: I was not, Your Honor.

The Court: Very well. I will still hear from you, if you can show me where I am wrong.

(Mr. Taylor then presents further argument on the motions in question.)

The Court: I am satisfied that the evidence is sufficient to establish this building as a dwelling house. I am wholly satisfied and so hold.

Mr. Taylor: The Court is holding, or the Court is going to put it up to the jury?

The Court: I am, so far as your motion is concerned, I am satisfied, so I will put the question to the jury, the question of abandonment.

Mr. Taylor: The question of whether it was a dwelling house?

The Court: No. The entire question is going to be put to the jury. I am satisfied that the proof is sufficient to go to the jury. You are asking me to dismiss it because it is not sufficient, but I find that it is.

Mr. Taylor: Well, if there is a doubt that it is going—I would——

The Court: I have no doubt, not the slightest doubt, not a bit.

Mr. Taylor: Well, if the Court has made up its mind there is no use me wasting the time of the Court or counsel or the jury.

The Court: With respect to the dwelling house, I have not the slightest doubt that the evidence is sufficient. That question [394] will, however, be put to the jury in the same manner with respect to the other necessary allegations. I did not mean

to be heard to say that I have doubt. I said if there is a doubt that must be resolved by the jury.

You may call in the jury. We will then proceed with the testimony. If the defendant intends to produce evidence it is necessary that he make a statement at this time.

(Mr. Taylor then makes an opening statement on behalf of the defendant.)

(At the conclusion of Mr. Taylor's statement, approximately 10:50, a ten minute recess was taken, the jury being first duly admonished.)

After recess

(At 11:00 a.m. court reconvened and the trial of the cause was resumed. Both counsel stipulated to the presence of the jury and all other necessary persons were again present.)

Mr. Crane: I would like to have this marked for identification.

Mr. Hermann: I would like to see it.

(A document was handed to Mr. Hermann.)

Mr. Crane: It is an official communcation which has not yet been recorded or filed, but I think the Court can take judicial notice. It is an official document, communication.

The Court: Communcation or document?

Mr. Hermann: If Your Honor please, I do not believe it is properly certified as an official communication, and I do not [395] believe it is relevant because of the dates included on it, the date of execution.

Mr. Crane: It pertains, Your Honor, directly to

evidence that was introduced by the Government, that was introduced this morning. In fact it is almost so closely connected that it would be considered a part of the same, the same transaction. And I believe it has the same signature.

The Court: What have you to say as to relevancy on account of the date, the 14th of February, 1958?

Mr. Crane: It releases the document that was put into evidence.

The Court: Yes. That document was introduced to show motive prior to the fire and had no other purpose. This is considerably afterwards.

Mr. Crane: Quite true. And the original document was introduced for the purpose of motive. Yet, on the other hand, all such documents would be somewhat prejudicial, and this would remove that, and we believe we have a right to put this document in to explain the other. We believe it really should be a part of it.

The Court: I think you are correct. You may put this in by way of explanation of the Government's proof. The relevancy of it will be for the jury then.

Mr. Hermann: Still the matter does not contain an official seal through which it could be admitted as an original record.

The Court: This appears to be a signed certificate of the Internal Revenue Service. It bears a notation of the regulations [396] under which it was issued. That the certificate have an official seal is not essential to the validity of this document.

Mr. Hermann: On the basis of an official document or record, there could be no introducing it without a witness as an official document.

The Court: I do not think that, as long as the instrument has apparently not been recorded, the official certificate of the recorder could be required. No seal is required. It does bear or purport to bear the signature of a Group Supervisor in charge for the District Director of Internal Revenue. I think in fairness to the accused the exhibit should be received in evidence.

Mr. Hermann: Very well, Your Honor.

(Document entitled Release of Tax Lien is marked for identification and received in evidence as Defendant's Exhibit No. 10.)

Mr. Crane: I would like to read this to the jury.

The Court: Very well.

(Defendant's Exhibit No. 10 is then read in its entirety to the jury by Mr. Crane.)

ARCHIE ADIRIM

is called as the first witness for the defense and having previously been sworn, testifies as follows:

Direct Examination

Q. (By Mr. Crane): Mr. Adirim, you have already stated your name and official position to the jury. I am going to ask you if you know who was in charge of the Steve Salinas restaurant or place known as the Kotzebue Grill from the night of the fire until the time that you made your investigation and picked up the exhibits?

(Testimony of Archie Adirim.)

A. At the time we picked up the exhibits Joe Brantley was in charge.

Q. The exhibits were secured by you and Mr. Harkabus and Mr. Oliver approximately five days after the fire, is that correct?

A. I believe some of them were picked up on the 27th and some on the 30th.

Q. Some on the 30th? A. Yes.

Q. In your course of investigating the fire at Kotzebue, did, in your official capacity, make inquiry from the Wien Alaska Airlines and from Alaska Airlines for a list or the names of incoming passengers for a period of ten or fifteen days prior to Christmas day?

A. Not that I recall.

Q. Do you know of your own knowledge whether I made such inquiry of them, or was it discussed with you?

A. Well, I understand you did, of one airlines.

Q. Do you know whether or not I was furnished that information? A. No, I don't know.

(There were no further questions from either counsel and the witness was excused from the stand.) [398]

ROBERT W. OLIVER

was then called and sworn as the next witness for the defense, and thereafter testified as follows:

Direct Examination

Q. (By Mr. Crane): Would you state your name, please, Mr. Oliver?

(Testimony of Robert W. Oliver.)

A. Robert W. Oliver.

Q. I will ask you to state your official position.

A. United States Marshal for the Second Division.

Q. Are you acquainted with the defendant in the case now on trial? A. Yes sir.

Q. I will ask you if, on or about the 28th day of March, 1958, if you received from me——

Mr. Hermann: I object, if the Court please, to the form of the question as a leading question.

The Court: Which he hasn't yet completed. I really don't know. Will you finish it counsel.

Mr. Crane: I will change the form of it.

Q. (By Mr. Crane): Did you, on or about the 28th of March, 1958, receive a letter signed by Fred D. Crane of counsel for the defendant Steve Salinas, requesting and demanding that the defendant Steve Salinas be given a lie detector test?

A. Yes, I received a letter, and that was included in the letter. I don't recall the exact date of the letter.

Q. To your knowledge was any such test given Mr. Salinas?

A. Not to my knowledge, no sir. [399]

Cross Examination

Q. (By Mr. Hermann): Mr. Oliver, was an answer made to that letter that you received from Mr. Crane? A. Yes sir.

Q. Do you have a copy of that answer?

A. I do. It's in my office.

(Testimony of Robert W. Oliver.)

Mr. Hermann: I would like for him to furnish it. However, it is purely—such has never been allowed in court.

Mr. Crane: If Your Honor please——

The Court: That is, evidence based upon a lie detector?

Mr. Hermann: Yes, Your Honor. It has universally been withheld.

The Court: I rather think that is true. I think the courts have found thus far that such has not been established as sufficiently correct.

Mr. Taylor: In this case with permission of the defendant and if accepted, it would be by stipulation of counsel for the defendant. That would certainly make it admissible.

Mr. Hermann: Well, if they——

The Court: If it would be admissible with the consent of the defendant.

Mr. Hermann: I want it clearly established that they are introducing the evidence regarding the lie detector. (To witness), would you please get Mr. Crane's letter and the answer.

(The witness leaves the stand.) [400]

Q. (By Mr. Hermann): Would you please identify those documents, Mr. Oliver.

A. This is a letter from Fred D. Crane addressed to me in my official capacity and dated the 25th day of March; and this is a reply addressed to Mr. Fred Crane with a carbon copy sent to Mr. Salinas, and this letter is dated the 31st day of March. These were sent certified mail and I had a return receipt showing that Mr. Crane received

(Testimony of Robert W. Oliver.)

it, the letter, and that Mr. Salinas received the copy of it.

Mr. Hermann: I would like to have this marked.

Mr. Crane: I have no objection to its being received in evidence.

Mr. Hermann: We hereby offer it in evidence.

Mr. Crane: That is, my letter, and the answer.

Mr. Hermann: I would like to inquire whether counsel has any objection to any particular part of the communications at this time?

Mr. Crane: Not so far as I know.

(Letter to Mr. Oliver from Mr. Crane dated March 25; and letter (carbon copy) to Mr. Crane from Mr. Oliver and Mr. Hermann dated March 31 are admitted as plaintiff's Exhibit AA.)

Mr. Hermann: I would like at this time to read them to the jury, starting with the letter from Mr. Crane to Mr. Oliver.

The Court: Very well. [401]

(Plaintiff's Exhibit AA is then read in its entirety to the jury by Mr. Hermann.)

Q. (By Mr. Hermann): Now Mr. Oliver, was any acceptance ever made in regard to the offer of Sodium Amytal or Sodium Pantothol tests?

A. No sir. I never talked to the defendant; I talked to his attorney briefly on the subject in my office one day.

Q. Have they ever discussed further the possibility of taking a lie detector test?

A. Well, at the time of the discussion there I

(Testimony of Robert W. Oliver.)
understood that they wanted no part of any of the tests.

Q. Have they ever sent you the results of any such test?

A. No sir. It came to my knowledge that Mr. Salinas was in Anchorage, and I don't know whether he contacted the Territorial Police or not there. I didn't check. But he never sent me a copy and I have never received any word indicating that he did take such a test or any other kind.

Q. Has he ever bothered to discuss the case with you at all? A. No sir.

Q. Ever come forward and offered to make a statement?

A. No sir, neither the defendant nor his attorneys.

(There were no further questions and the witness was then excused.)

E. J. McKENNY

is then sworn as the next witness for the defense and thereafter testified as follows: [402]

Direct Examination

Q. (By Mr. Taylor): Would you please state your name? A. E. J. McKenny.

Q. Where do you reside? A. In Nome.

Q. How long have you lived in Nome?

A. Probably a year and a half.

Q. What is your occupation, Mr. McKenny?

A. I am a electrician.

(Testimony of E. J. McKenny.)

Q. How long have you been following that business or profession?

A. Probably 30 years.

Q. Where did you receive your training in electric work?

A. I served an apprenticeship in St. Louis, Missouri with the Union Electric Missouri Valley Co. and that apprenticeship lasted a little more than four years.

Q. After you had finished your apprenticeship what type of work did you follow? What particular type of electrical work?

A. Well, I followed the usual procedure. I went to work on the ground and line crews for the City of St. Louis, progressed through the ranks over a period of probably, well, I would say three to four years, in various positions as they came up on the seniority list and then became a journeyman lineman, and then did journeyman (narrowbacking) which is, in the trade, a term for inside electrical work, and I followed that more or less since that time, but sometimes I have done line work.

Q. Have you done any scholastic work? Have you studied the principles of electricity?

A. I have, as an apprentice, when serving my apprenticeship and also at [403] various trade schools in the Navy. I have a diploma from a couple of Navy schools which, of course, probably aren't too high a standard. Nevertheless they are what we had. And I have also taught in service schools.

(Testimony of E. J. McKenny.)

Q. Do those studies include the principles of electricity? A. Certainly does.

Q. This inside work you say, was that in connection with the wiring of buildings of various types?

A. Most inside work, as a general rule, I have found to be the installation of conduit, Romax, BX cable, knob and tube work, and now plastic covered cable, in the installation of commercial induction wiring, and residential light and power and communication systems, sir.

Q. Have you held any official position in any cities or towns concerning electricity or electric planning or distribution lines?

A. Well, I don't exactly understand what you mean. If you mean official positions—of course in my connection with the Union I have worked for a number of cities off and on.

Mr. Hermann: If Your Honor please, the Government will stipulate that he is qualified as an electrician.

The Court: Very well.

Q. (By Mr. Taylor): Then you understand the principles of electricity as applied to a distribution system in a building? A. Yes, I do.

Q. Mr. McKenny, in your work as an inside electrician have you had occasion to use BX in wiring a building? [404]

A. I have, sir. BX cable is not in vogue in the field. The fact of the matter is, that while it hasn't been outlawed by the Standard Electrical Code, it

(Testimony of E. J. McKenny.)
has been outlawed in most cities and I haven't had occasion to use BX cable in the last, probably, seven or eight years. But I have used it before that time.

Q. Do you know the names of the cities that have outlawed BX? Name a few of them.

A. On the West Coast there is Los Angeles. Unless—I haven't been down there lately—I would say—lately perhaps, these things have been repealed. But to the best of my knowledge Los Angeles will not even permit it in the city let alone be used. They won't let you put it in any kind of an installation. San Francisco is rough on it. I believe there are a few areas there where you can use it, away from the city. In the State of Washington the City of Seattle doesn't permit it, with a few exceptions, and possibly they have been eliminated. The City of Tacoma will not permit it at all.

Mr. Hermann: If Your Honor please, the Government will stipulate that BX cable is presently considered not of a safe type to use.

The Court: Very well.

Q. (By Mr. Taylor): Now, Mr. McKenny, can you tell the Court and jury, if you know, why BX is frowned upon by these cities and by electricians in general?

A. Well, BX—if you are not familiar with it—BX usually contains two or more conduit and it is necessary that it contain for each one a conductor or carrying wire. That cable is surrounded, or the conductor surrounded or shielded by a metallic

(Testimony of E. J. McKenny.)
shield. This metallic shield usually [405] has been cut in the past by an electrician with a hacksaw, and in cutting the cable oftentimes you injure the conduit, or the conductor. I believe the Code still requires that where you do use it you put in a ground wire as a safeguard, but of course oftentimes there is laxity in putting that wire in there and it will get in without it, and if you do not ground a BX thoroughly it then becomes a fire hazard. It's entirely possible. Anyway, those are some of the reasons why BX should not be used. There are very many more. For instance, a person can drive a nail in it quite easily and it would be a very difficult thing to find, and would be quite a fire hazard when it does happen.

Q. Now this danger then consists of what might happen to a building, to endanger a building. What is that? Are you familiar with shorts?

A. Yes.

Q. What is a short in electrical terms?

A. A short is a name for a condition that exists in a circuit that precludes the proper travel in the proper path of current. In other words your current doesn't usually go out and do the things it should do, light your lamp. But rather it starts to travel to the ground and return. As a result you generally have a blown fuse, sometimes a fire.

Q. Are you familiar with the principle of the generation of heat, electric heat by induction?

A. Yes sir, I am. That is a well-known industrial principle.

(Testimony of E. J. McKenny.)

Q. Would you explain to the jury what that principle is and especially as to how it would be applicable to the use of BX cable.

A. Well, that is one of the reasons why we do not like to use BX cable, because inductive heat going through is a very powerful type of heat, which applies in the industrial, commercial field and also in the medical field. [406] We find that—would it be permissible to look at that piece of cable there?

Q. Mr. McKenny, I hand you Exhibit L. You might use it to illustrate to the jury if you wish.

A. Now you see here (indicating), you have two conductors in this shield, I spoke of, which shields a heating element; under certain conditions it will short, and this is very possible if you do not have what we call a solid neutral, in other words a neutral from the ground up.

Q. Would you explain what you mean by a neutral.

A. Well usually in the circuit you have two or more wires, one called the hot side and one called the neutral side. The hot side usually comes out from the generator or comes out from the source that generates the power and goes through the neutral; performs the work going through the hot side and returns through the neutral. Now of course that isn't exactly correct but to make it simple that is fairly accurate. Now if you have that neutral solidly grounded, not unfastened, then if anything happens, a fuse blows, it wouldn't be

(Testimony of E. J. McKenny.)

along the hot side and there can be no danger. Your current, of course, is cut off and dead. But if you run into a haywire job, and I have wired many jobs where conditions were not in our favor, you have to guess—I have run into cases where you have to guess where your neutral is. If you, yourself put it in, you know where it is grounded. Even then sometimes it will break. A lot of the time the neutral will look perfectly o.k. but isn't, and may be broken somewhere. When your neutral breaks your current, of course, cannot return through the neutral and will probably go to ground through another source, another path, perhaps a water pipe or another wire or something like that. In short, you have a current going through this [407] conductor, through this conductor here (indicating on the exhibit); it goes on through this path here, and if this conductor and this outer shield are not grounded then you run into this principle of inductive heating that we spoke of awhile ago. This outer shield will become red hot and if hot long enough, depending of course on your current going through the line, will even melt and a number of fires have started as a result. The fact of the matter is that many fire investigators, underwriters, will tell you this is one of the greater hazards in electricity and explains why we have tried to get this outlawed for so many years.

Q. Would you examine that exhibit — I forget the number of it——

A. Exhibit L.

(Testimony of E. J. McKenny.)

Q. ——and I will ask you to examine that and state, if you can, whether in your opinion that exhibit has been exposed to, would you say, considerable heat? Whether it has been exposed to considerable heat?

A. It has been exposed to a lot more heat than would be safe, I would say I don't know what you mean by considerable, but certainly more heat than it should have been exposed to.

Q. What causes you to have that opinion, Mr. McKenny?

A. Well, the general physical appearance, the remainder of the insulation here, that has a tendency to disintegrate in the course of handling; and also you see the discolored area along here (indicating), you see where—. It is not ash particularly, but the residue of combustion or at least evidence of it.

Q. Is that soot and char, is that from heat inside of that cable, Mr. McKenny? [408]

A. Well, of course I imagine it would take a laboratory test to determine that, and scientific apparatus, but it has all the appearance of having heated from the inside to a great degree, or at least it does to me. In other words, it appears as if the heat was generated on the inside rather than the outside. See here (indicating)—the coal tar content of the insulation has boiled from the inside out. If it had originated from the outside the insulation would be burned off.

Q. Do you say that by reason of the appearance of the BX in this particular instance?

(Testimony of E. J. McKenny.)

A. The general appearance of it and the appearance is what I can see. I didn't pull the conduit out. Would that be permissible. If we could pull it out to examine it perhaps the appearance could tell a little bit more, if we were granted permission to pull it out.

A. I do not have the power to grant such permission. I think that would be up to the Court.

The Court: If you request it such permission may be granted.

Mr. Taylor: I would ask permission.

The Court: Very well.

A. Well, we will see, if you want to see what it looks like inside. Now if this has been burned from the inside it usually—it's pretty hard to get out—(the witness is manipulating the exhibit), but we will see what we can do with it. Well—there goes your insulation. That, to me, looks as if it were burned from the inside because, as I said, here is evidence of the coal tar components of the insulation here on the outside, and if the heat had been from the outside, it probably would not be present.

Mr. Taylor: If Your Honor please, I would like to see that this (indicating), doesn't become disattached from the exhibit.

Q. (By Mr. Taylor): Now, Mr. McKenny, I will just ask you, from your examination of those conductors inside of the BX, can you state whether or not the insulation has been burned off of those wires? A. Sure: There it is.

(Testimony of E. J. McKenny.)

Q. Is there any insulation on those wires now?

A. Not that I can see.

Q. When those wires were put into that piece of BX would they, would that have been insulated wires?

A. Well, sir, if they weren't the cable would serve no purpose at all. It would be a dead short, absolutely. Absolutely useless. I couldn't say about that one, of course, because I just saw it, but if it wasn't insulated it would be a useless piece of material.

Q. From your experience as an electrician what degree of heat would be generated which would be sufficient which would burn the insulation off of those wires?

A. Well, that's something—I don't believe I ever had that question put to me, but a fairly high heat. Judging from lead, the fact that it is somewhere around 450 degrees, it would have to be a little bit higher than that. I would guess 600 degrees perhaps; I don't know.

Q. Do you know what the fusing point or melting point of tin is?

A. Tin I believe is in the neighborhood of 600 or 650 degrees. Now I couldn't say for sure on that, but that's my estimate as I recall. [410]

Q. Do you have any charts in your possession that would show that?

A. No. We usually use the electric code. The electric code usually has that in the back of it, or Westinghouse or General Electric handbook or such

(Testimony of E. J. McKenny.)

as that, but I don't have one in my possession.

Q. I believe—I had this in my pocket. Could you say whether or not that book contains the melting point or the fusing point of the various minerals? A. This particular book here?

Q. Yes sir.

A. I don't know. I would have to look at it and see. It's the usual Westinghouse pocket book that is given out as a little advertisement and the boys usually carry it to familiarize themselves with information that may have been forgotten.

(The witness looks through a little book.)

Mr. Taylor: I would just like for the present, Your Honor, for Mr. McKenny to refresh his memory as to the fusing point of at least two metals.

The Court: By using the book?

Mr. Taylor: Yes sir.

The Court: Well if the use of the book would refresh your memory (to witness), you may use it. You say the book is put out by Westinghouse for electricians and generally used by them?

A. Yes sir. In the course of a day you may use it many times.

The Court: You may use it if it would refresh your memory on the question. [411]

Q. (By Mr. Taylor): Is there a table?

A. There is. There is a table here that gives the property of metals. I see one column of material, one of liquids and one of metals and other materials. And in the metal column there is aluminum and so forth. There is lead, and down here is tin.

(Testimony of E. J. McKenny.)

Q. What is the fusing point or melting point of tin?

A. The melting point of tin is 450 degrees fahrenheit.

Q. What is the fusing point or melting point of lead? A. 621 degrees fahrenheit.

Q. Would that chart there show what the fusing point or melting point of commercial solder would be?

A. I don't know. No, it does not, that I can find.

Q. What are the components used in making solder, Mr. McKenny, if you know?

A. Well, there are several different grades of solder which have been used. Solder, as the standard in the profession usually referred to, is usually referred to as 50/50. That isn't exactly what it is, but it's roughly 50% lead and 50% tin, and antimony and perhaps some other agents are in there in slight degrees. But it could be also by as much as 80/20, 80% lead and 20% tin and on down to a reversal of that.

Q. What is customarily used in connection with wires on inside wiring?

A. Well, I have always followed the practice of using 50/50, half tin and half lead, which is usually available in practically every market, and I believe that is customarily specified for Government buildings which were [412] considered to be a standard.

Q. Now Mr. McKenny, I believe in your busi-

(Testimony of E. J. McKenny.)
ness, do you use soldering irons to quite an extent in soldering in connections?

A. Yes sir. We use soldering irons. However, most men prefer some type of torch, usually more practical to use.

Q. Both torches and soldering irons are used?

A. Yes sir.

Q. Now Mr. McKenny, I am going to call your attention to plaintiff's Exhibit I and plaintiff's Exhibit E and ask you if you can put those together in such a manner as to make them a workable instrument for soldering?

A. Apparently this goes in here (indicating), however there appears to be some components that are missing. I believe there's an insulator or two that isn't here. This heating element will go in the shell but I don't believe under the present conditions that it is placed correctly. I think it sets down too far and there is no insulator there to keep these wires from shorting, so with just these materials here I couldn't make a soldering iron out of it.

Q. I might just call the jury's attention to this insulation that came out of that. Now maybe we won't get so dirty.

A. No, I couldn't make a workable rig out of that the way it is now, without a few more parts.

Q. Now there would be considerably more to this then to make a workable instrument?

A. It seems to me it needs another insulating bushing on there and some type of insulator or

(Testimony of E. J. McKenny.)

something to keep those wires apart there, as it sure won't work that way. [413]

Q. Now in looking at that exhibit, or those exhibits together, do you have any idea or opinion or knowledge as to what size, if these go by sizes, that this would be?

A. Well, I didn't read the data on there. However, if you would let me see it again, it's the only way I can tell you what size it is without putting a receiver or a meter or something like that on there. I would just have to read the label on there is the only way I could tell.

(The witness examines the exhibits.)

Well, that's a 55 watt iron intended for use on 115 volts, according to the data on there. Incidentally, I don't see any underwriters label on that thing so I don't know whether it is tested and approved or whether that data is correct. Usually we don't accept that stuff unless we have the underwriters labels because some of these people do put it over on us.

Q. Would you have an opinion as to what degree of heat would be generated by such a soldering iron as this if it was in workable shape?

A. Well, it would depend on how long you would leave it on and also on the voltage. If the voltage was low it wouldn't of course heat as quick. If it was high quite a high heat could be reached; ultimately it might even melt down. I have never seen one that did but I suppose it could if you left it on long enough, but there are a lot of factors involved in there.

(Testimony of E. J. McKenny.)

Q. Now, Mr. McKenny, I am going to ask you one more question—it's getting along toward lunch time—now assuming, that this exhibit L was found in an attic of a building and in which attic a fire had occurred, and that this exhibit was laying on sawdust insulation there, would you have any opinion as to whether or not this particular piece of BX could have been the cause of [414] igniting the sawdust in that attic?

A. Pardon me, did I understand you to say "could have been the cause of igniting" it?

Q. I asked you if you have an opinion as to whether or not it could have been the cause?

A. It could have been. In my opinion it could very well be. I said it could have been and that's partly by the fact, as you can plainly see, there has been excessive heat on this outside cable here, or the outside shield, and of course depending on the type of sawdust that you had surrounding it. Perhaps if the sawdust were a bit damp or something like that, perhaps it wouldn't. If it were ordinary sawdust, perhaps fir, douglas fir, pine or something like that with resin content of any size, I would say in my opinion it could very well start a fire.

Mr. Crane: If Your Honor please, I might have a few more questions for Mr. McKenny but I would ask that we take the noon recess at this time.

The Court: Very well. We will recess this case until two o'clock.

(Testimony of E. J. McKenny.)

(Thereupon the jury was duly admonished by the Court and the case recessed and court recessed.)

After Recess

(At 2:00 p.m. Court reconvened and all necessary persons being present, the trial of this cause was resumed. The witness on the stand at recess resumed [415] the stand for further direct examination. Both counsel stipulated as to the presence of the jury.)

Q. (By Mr. Taylor): Mr. McKenny, did you make any tests with a soldering iron and sawdust recently? A. Yes, I did.

Q. Why did you make that?

A. At the request of defense counsel I made an experiment sir.

Q. What was that experiment?

A. The results of the experiment or how it was done?

Q. What experiment did you make?

A. We secured a sack of sawdust, approximately three or four pounds I would say, of not especially high grade sawdust, just what you might call mill run; in other words I presume just grabbed up from the floor and thrown in the sack. In the sawdust were some splinters. The sawdust had the appearance to me of being from Douglas fir. It was quite dry and a little bit finer than the general type of sawdust you would generally expect to find as to appearance. Then I got a bread pan approximately a foot long and perhaps half as wide, and

(Testimony of E. J. McKenny.)
about three inches deep. Then I got a piece of very dry quarter-inch plywood, Douglas fir, placed it in the bottom of the bread pan, after which I put the sawdust in the pan on top of the plywood at an approximated depth of one and three-quarter inches, and I measured that distance with a rule. So I took a soldering iron, plugged it in to a source of current that should have been 120 volt, and was approximately 112 volts at the time, fed by a conductor comprised of two-wire, 12 Romex. We plugged that in, if I remember right, I [416] have forgotten now, about three o'clock, a few minutes after 3:00 p.m. that particular day and by——

Mr. Hermann: If Your Honor please, I object to any results of the test. It has not been shown that the factors involved in the test by Mr. McKenny in any way are similar to the ones involved in this case. It has never been shown whether the sawdust in the Kotzebue Grill was made out of fir. There is quite a difference between pine and fir. It has never been shown what kind of a soldering iron was used, whether it was the same kind, smaller or larger. It has never been shown whether it was two-wire No. 12 Romex or whatever the Romex mentioned was, whether it was the same type of cable. Also objected to that the kind of sawdust has not been shown as the same type of wood he is referring to. In other words, that the conditions of the test can in no way be related to anything material in this case.

(Testimony of E. J. McKenny.)

The Court: So far as the type of sawdust is concerned I think I understood from both the testimony of this witness and Mr. Harkabus that there is little, if any, difference. The other conditions have not quite been explained, counsel.

Mr. Taylor: I am prepared to meet those now.

Q. (By Mr. Taylor): Mr. McKenny, I will have you take a look at that soldering iron and then have you compare it with the remnants of a soldering iron which was introduced in evidence here as Exhibit E and Exhibit I and state, if you can the similarity or whether they are similar or identical.

A. This iron here (indicating), I couldn't read it when previously [417] presented to me, but I see this is No. 55 B, Soldermaster, apparently made by the H-e-x- something or other Corporation of Roselle Park, N. J. I presume that's New Jersey. That is, the iron is 55 watt, 115 volt. Then here (indicating), this is a Soldermaster iron, 55 watt, 115 volt, No. 55 B, made by apparently the H-e-x- or something or other, Inc. of Roselle Park in New Jersey, I presume. So they would be very, very similar, the same wattage and the same voltage.

Q. Would they not be identical?

A. Well, I couldn't say that they are identical, not honestly, because I would have to put a meter on them to test the resistance; if this element here is a component part of this shell. If it is.

Q. After putting the soldering iron in the sawdust, how deep did you bury it?

(Testimony of E. J. McKenny.)

A. I covered the iron. Now I did not bury it in the usual sense of the word, but I placed sawdust to the top of this part here (indicating), in the pan, to the top of it. I didn't put the thing to the top but to the point where it was stencilled on top, to which point we partially buried it.

Q. Did you then plug it in? A. Yes.

Q. How long did you allow that soldering iron which I have just exhibited to you to remain in that sawdust?

A. Two hours and thirty-five minutes sir.

Q. What was the result of that test after the soldering iron being in the sawdust for two hours and 35 minutes? A. The net result?

Q. Yes. What occurred? [418]

Mr. Hermann: I object on the grounds it has never been shown anywhere in this case that the test referred to is similar. There has been no indication that a soldering iron was buried in the sawdust or that it was sawdust which was first, in fact, ignited by the soldering iron.

The Court: Well, the facts we do know precisely are, that the evidence was, that the iron, or a portion of it, was found between the joists of the attic and that there was sawdust between the joists. It is impossible to tell precisely whether this experiment was conducted with the sawdust buried to the same extent or whether the iron in the attic was buried at all. But it strikes me, so far as can be shown by the evidence, that the experiment is sufficiently similar that the results may be shown. Now again, the weight of it is for the jury.

(Testimony of E. J. McKenny.)

Q. (By Mr. Taylor): Mr. McKenny, would you answer the question please.

A. We left the iron in there, as I said, for a period of two hours and thirty-five minutes.

The Court: Turned on?

A. Yes sir. Plugged in and turned on. At first, I would say with ten minutes—I didn't keep any notes on this experiment—I would say within ten minutes the sawdust began to smoke. After a period of an hour the sawdust had charred and receded from the iron a distance of about three-quarters of an inch, but the iron, the weight of the iron had caused it to fall down, you understand. That sawdust at no time burned but it charred and did smoke. [419]

Incidentally, I might add that we placed the bread pan on a table in an ordinary room. We made no effort to shut the draft off or give it any extra draft or anything like that. I thought I should conduct it in as fair a manner as possible to all concerned. At the end of about an hour and a half the room was getting so full of smoke from sawdust as to be uncomfortable, but there was still no indication of a blaze or anything like that. However, the sawdust was charred right along the iron. At the end of two hours and thirty-five minutes the sawdust had charred to the point where it had been reduced probably to ashes, to the point where the iron was on the plywood which formed the floor of the pan and had gotten charred; in fact it had charred along the floor, if I remember right, a place

(Testimony of E. J. McKenny.)
about a quarter-inch wide and about this distance (indicating), to the plugged section of the iron. At that time the place was so full of smoke I threw it out in the yard.

Q. (By Mr. Taylor): Was the current on at all times during that two hours and thirty-five minutes? A. All the time. Yes.

Q. And you say this test was conducted in a room where you had the normal amount of oxygen?

A. Yes. It was conducted in a room usually used for kitchen purposes.

Mr. Taylor: You may take the witness.

Cross Examination

Q. (By Mr. Hermann): Mr. McKenny, in the first part of your testimony you stated many—I believe you used the term "haywire"—that you had worked on many haywire jobs in Nome that included BX cable? [420]

A. Yes, there are many of them. There are quite a few "haywire" electric systems in the city of Nome.

Q. Have many of them ever been on fire as a result of them?

A. Mr. Herman, in my experience in Nome, I have found as a general rule that when we finally do get to a building with the fire equipment, it is usually in such shape it is beyond any possibility to tell what caused the fire, with two exceptions, the exception of two instances.

Q. Is it your general experience then that the

(Testimony of E. J. McKenny.)

cause of fire is hard to detect, whether it is the result of wiring or some other cause? Is that right?

A. As far as generalities is concerned, I couldn't go into generalities. The only thing, my experience has been it is very, very difficult to determine what caused the fires, with the exception of stove fires that we know of. As an example, we had a house burn—we have had two fires this winter and I don't know who would be qualified to tell you what caused them. However, in both of those, Larry Minnix's and John McNees', the wiring could very, very easily have been the cause of the fire. But I couldn't say for sure.

Q. There are many old houses with BX that have not burned, are there not? A. Yes.

Q. In Nome now?

A. Well, yes. I suppose there are a lot that haven't burned.

Q. They don't always burn, do they?

A. No. They don't always burn.

Q. Now I am handing you plaintiff's Exhibit L which consists of two inter-wrapped wires and a BX shield or cover. Now you testified, I believe, [421] that there was some charred insulation there?

A. There certainly was. Yes.

Q. Now would a wire in the condition it was before you took it out, if it were doused with water, what would be the result?

A. Well, there again, there are a lot of factors involved, Mr. Hermann. How hot was it when it was doused with water, for instance? Was it alive at the time?

(Testimony of E. J. McKenny.)

Q. Assuming it was alive at the time, what would be the probable result?

A. There probably would be steam arise from it.

Q. Would it be apt to short?

A. It could. It would depend on whether or not the insulation was charred. Possibly it could.

Q. If it was charred to the extent it was when you took it apart, would it be likely to short or what?

A. In the first place, a wire that was charred to the extent this was when I pulled it through probably would have no current in it, because it would have gone to ground and blown out the fuse by the time it got that hot, and so there wouldn't have been any current there.

Q. Let's assume this wire when you found it—let's assume this wire, before you took the insulation out, if they got immersed in water, then what?

A. If the current was on there, yes.

Q. Then you testified there is evidence of heat on here (indicating). Can you definitely state that is electric heat or is it possible it is another source of heat?

A. Mr. Hermann, that may have been electric heat there; it may have been [422] some other source of heat in there. I have no intention of engaging in argument with you, but if you will look here (indicating), you can see indications of these petroleum products that form the component parts of the insulation of the wire. Indication of it bubbling out. My contention is that if the heat were

(Testimony of E. J. McKenny.)

applied externally, as apparently has been done here on this end (indicating), then that would not be in evidence because that would have been burned off.

Q. Well, when something is heated, it expands.

A. That's a generally accepted rule of physics.

Q. Couldn't it be expanded by heat from an exterior source and force its way through?

A. Well, if the heat were from the outside it would burn both; there would be no residue on it.

Q. If it remained hot, it might remain on there, might it not? Do you think that's possible?

A. Well, I have never thought about that. It probably would be hot for awhile after the fire went out.

Q. Now you testified, I believe, that it will depend on whether or not there was a ground?

A. Yes. That is one of the important factors in determining heat by induction.

Q. Does this one have a ground with it?

A. There is, Mr. Hermann, supposed to be.

Q. There is a wire on the floor here now (indicating).

A. I imagine so. It looks like it, like the same thing. Probably is. [423]

Q. This wire?

A. But this wire (indicating on the exhibit), is usually used as the ground, and usually used for this very self-same purpose, to make this a continuous outer shell. That is why it is put in there. But, including myself, very few electricians are

(Testimony of E. J. McKenny.)

energetic enough to hook it up when we put it in. But if properly grounded it wouldn't heat the way it has been heating.

Q. You have no way of knowing whether that was hooked to a ground or not?

A. I never saw it before it came in here, but from the appearance it was not grounded.

Q. Is there any indication on the cable or wire of a short?

A. Well yes; there is indication of burning, of a short. But I can't say for certain. That is something you couldn't determine without certain circumstances, because the indications would be about the same for a short or for a one-line.

Q. Then you can't definitely say that this cable has, in fact, shorted, can you?

A. No I can't say definitely as a fact that that has shorted. It's my opinion it's probably an induction heat and not a short.

Q. Induction heat? A. Yes sir.

Q. But the reason—is it possible that it was from an exterior heat?

A. Yes. It is possible there is an exterior heat, but that is a rather odd looking piece of cable for it to be exterior heat. Its appearance is rather odd.

Q. Now if this cable were to receive a high degree of exterior heat, would it become less safe than it would otherwise? A. Certainly.

Q. Now I believe you gave the melting temperature of lead at 621 degrees. Is that correct?

A. I believe that's right. I don't try to remember, but that's approximately correct.

(Testimony of E. J. McKenny.)

Q. But should a soldering iron, to be efficient, be hotter than that, sir?

A. Just to tell the truth I have never put a thermometer on a soldering iron, but we usually heat them up until they heat the solder.

Q. You want to melt that solder, is that right?

A. Yes. It melts in a reasonable length of time.

Q. And to do that it would have to be hotter than the melting temperature of the tin or lead, would it not?

A. Mr. Hermann, in using solder we aren't concerned with the melting temperature of the element itself, but with the solder. There is a small pamphlet we use that gives the melting temperatures there. And if we have lead and tin it will bring it about half way in between. If an iron is not new we usually test it; if it's new at the time, it's generally hot enough when we try it out.

Q. Just a couple of questions, Mr. McKenny. About half way in between that would be roughly about 500 degrees? Would that be very close?

A. I would say somewhere along in there. I am just guessing.

Q. To have a finished soldering wouldn't you require it a great deal hotter?

A. Not a great deal because you then get too much of it, and that is no good. [425]

Q. Why not?

A. It is not necessary to melt your elements, just your solder.

Q. Not only has to melt it, but don't you re-

(Testimony of E. J. McKenny.)

quire that the soldering iron remain on for short periods to put it where you want to put it?

A. Yes, that's why we generally don't want to use a soldering iron.

Q. Then it's just necessary to have it some hotter than these melting temperatures?

A. Yes, some hotter.

Q. Is it desirable that it be several hundred degrees hotter?

A. If you heat it very much hotter than the code temperature then you haven't any solder; and under certain conditions, for instance getting acid on your plug, then there goes your iron. You don't want too much heat.

Q. Now if a soldering iron were left on indefinitely over a long period of time, does it become more apt to ignite things than it does otherwise? Is there relationship?

A. There certainly is. I would say yes.

Q. And a soldering iron left on all day would become hotter than one left on for four hours?

A. Yes, up to a certain point. Radiation would take care of it beyond that point probably.

Q. Now do you know what the ignition temperature of paper is? A. No, sir, I don't.

Q. Or gasoline?

A. Gasoline? No, I do not.

Q. Do you know to your own knowledge, whether a soldering iron would [426] ignite paper or gasoline?

A. In certain circumstances a soldering iron

(Testimony of E. J. McKenny.)
will ignite either, but I think I have never seen an experiment with gasoline. I think a man would be foolish to make such an experiment.

Q. You wouldn't recommend such an experiment would you?

A. No. Not to an average man.

Q. Now you were present in court during the course of the trial, I believe, were you not?

A. I have been in and out of court, yes.

Q. And you have heard the premises described of the Kotzebue Grill?

A. Mr. Hermann, I couldn't say, because I have heard people—you know—talking around town and I have a general idea of what the premises are like, but whether I got it in court or not I don't know.

Q. Have you been to such a place?

A. No, I never have.

Q. You have never inspected the place?

A. No. I don't know anything about the facts of the matter.

Q. You have no personal knowledge of Kotzebue, or the premises known as the Kotzebue Grill?

A. No, sir.

Q. Mr. McKenny, I am now holding Exhibit E, the casing of a soldering iron. Now you stated that this worked on the principle of induction?

A. I did not, knowingly.

Q. Now does the element heat the tip of the iron? A. May I see that. [427]

(The exhibit is given to the witness.)

A. Mr. Hermann, this device here is a resistance

(Testimony of E. J. McKenny.)
device that probably is made of a metal known as nicron.

Q. Are you referring to just the top half or the whole?

A. I am referring to the whole iron, the whole element, if this is a soldering element, and I presume it is.

Q. This top part here (indicating), is that the same material?

A. No, this is not. This top here is insulated, and, as you will note, it has two holes down the middle, and the purpose of the two holes is to keep the wires separated so there will be no short circuit, and this here (indicating), is what we call the head as a general rule. It composition—you see in there (indicating), is another conductor insulated with a ceramic product as a general rule, while this element here, as I said before, is probably built of what is known in the trade as Nicrom, in other words a metal comprised of nickel and chrome. I am referring to the heating element. This is the device you see meeting here (indicating), with the two little screws on the end of it. Now one of these wires goes down on here (indicating). You will observe—I presume you don't want me to destroy this?

Q. No.

A. One of these wires, no doubt, goes to here (indicating). I can only see one end here but I am sure this is probably what is called a wound element. In other words it probably goes in a

(Testimony of E. J. McKenny.)

spiral manner to here (indicating), and then it takes off up through here (indicating) in the middle, and this would be the other terminal of it, and that would be a type of resistance coil. [428]

Q. A resistance coil? A. Yes.

Q. How is the heat transmitted to the business end, the tip of the soldering iron?

A. By contact probably. I didn't operate that iron to see. I imagine by contact. That seems to be the usual way. And there should be in that——

Q. Is that what is called heat by induction?

A. No, sir, that is not induction. I believe that heating would generally be termed a radiation. I am not sure.

Q. Radiation? A. I believe so.

Q. Now over any given period of time, which would become hotter, the inside piece or the tip?

A. Well now, that, from a scientific standpoint, I couldn't say, but I imagine the element would get hot and transfer its heat to the copper tip. That is the principle on which a soldering iron works.

Q. This would heat up first and in turn heat the other (indicating)? Is that it?

A. That's right.

Q. And this (indicating) would probably get hotter, wouldn't it?

A. As I said before, I couldn't say from measuring with a thermometer, but my judgment is that it would.

Q. Now Mr. McKenny, I believe you stated that a shorted BX cable laid on sawdust could ignite it?

(Testimony of E. J. McKenny.)

A. Well, Mr. Hermann, please bear in mind that if there were a short it [429] would probably blow a fuse; but if there were induction it probably wouldn't blow a fuse because the load would remain the same. Now that's difficult to visualize perhaps. But that is why fuses are in the circuits.

Q. When you made that statement, are you assuming there was a coil created?

A. Well, it could set the sawdust on fire or other materials. It has done it.

Q. Well, is a coil of that type any hotter than a coil of this type (indicating)?

A. It depends there on a lot of factors, Mr. Hermann, again. Now a coil of that type with an amperage and a certain voltage would attain a melting point to melt metal. That, of my own knowledge, I can attest to because I have seen it, and particularly if you had a piece of, say, what we call No. 22 wire, then that would carry in the neighborhood of 35 or 40 amps., and that amount of current in there pushed along by about 120 volts would make a very good heating coil indeed.

Q. Would you say that either one of them could ignite the sawdust then?

A. Yes, sir, either one of them could do it.

Q. Either the element or the BX cable?

A. Yes, sir. A soldering iron undoubtedly could under proper conditions, if it had air, or oxygen could get to it; in time it would probably ignite the sawdust.

Q. Do you think it would make any difference,

(Testimony of E. J. McKenny.)
that is, if you know, would it make any difference whether the sawdust was completely covering the iron or whether the iron was on the surface of the sawdust? [430]

A. To be technical, no I do not; but I would think that if it were completely embedded there would be less chance of air getting to it so it would take a longer time bursting into flames. On the experiment I conducted it was just barely covered, so the air got to it.

Q. It might make a difference then as to how deep it got buried?

A. I can't say; but in my opinion if you can't get air to it, it doesn't look like it would ignite as fast, if it did ignite.

Q. Now in reference to this experiment you made, have you made any other experiments?

A. Along what line?

Q. Along this nature?

A. No, I didn't consider it necessary. Because I didn't have the exact sawdust I doubted very much the value of monkeying around with anything other than the exact sawdust in the exact circumstances. I couldn't go to Kotzebue and didn't feel too inclined to fool around with it. I understood that more experiments were being made in a more technical manner.

Q. Did you ever, at any time, experiment with just the element part without the iron?

A. No, I didn't experiment with the element part at all.

(Testimony of E. J. McKenny.)

Q. Could you state whether or not it is customary for a soldering iron to have a wooden handle?

A. Most of them have.

Q. Now if the handle is removed, would that have any effect on the inner parts? Would they be apt to fall out?

A. It would depend on the make of the iron, I imagine. The handle [431] usually holds the element in there.

Q. If the handle is off the element could be pulled out easily?

A. Let's see—I don't know—I never tried it.

Mr. Crane: If your Honor please, if both the witness and the Court will please bear in mind that we still have experiments to perform with that iron. Do not destroy it.

A. Well, I am not going to get that off apparently, so probably that holds the element in.

Q. (By Mr. Hermann): Now in this experiment you performed was there any gasoline or any other inflammable fluid placed in that sawdust?

A. Not in that experiment, no, sir.

Q. Was there any paper placed in the sawdust?

A. No, sir.

Q. Did you experiment with paper at all?

A. No, sir.

Q. Do you know whether or not the iron would have ignited the sawdust if paper was with it?

A. As far as that particular iron goes, that is the only time I performed any experiment with it,

(Testimony of E. J. McKenny.)
sir, but to my own knowledge other soldering irons have set paper afire.

Q. It's generally considered dangerous to leave a soldering iron on?

A. It depends on the circumstances.

Q. For a rather long period?

A. It still depends on the circumstances. [432]

Q. Now you mentioned that you used the regular Nome voltage to conduct the experiment. Do you know whether or not the voltage here is lower or higher than in Kotzebue?

A. Not to my knowledge. But in viewing some of the Rural Electric Association reports and so forth and so on, I find that their regular voltage is rated at 115 volts, and ours is rated at 115 volts. However, we don't have 115 volts, as you well know.

Q. Do you know whether Kotzebue has?

A. That I don't know. I don't know what their actual voltage is.

Q. Do you know whether or not they have a REA plant?

A. Well, the reports that I got, that I looked over, intimated that, or I intimated from them, the manager or managers, that they had a REA plant, and I presume they were accurate reports. But I have not been to Kotzebue except passing through and I couldn't say personally from my own knowledge.

Q. From the reports you would say they have?

A. From the financial reports I read, yes, sir.

(Testimony of E. J. McKenny.)

Q. You didn't, I imagine, check the exact voltage at the time of the experiment, did you?

A. No, I didn't check the exact voltage on the experiment we had, but I know what it is.

Q. About what is it?

A. At that particular point that voltage never reaches any more than 112 volts except on surges, and usually operates on a voltage of, say, around 108 volts, in that particular neighborhood.

Q. Then there could be a gap of ten or less volts between that and the standard REA line? [433]

A. Well, I am sorry—but as far as that goes I didn't check that voltage. It has been known to drop down in some neighborhoods to eighty some volts.

Q. Well that would affect the time it would take an iron to heat, would it not? A. Certainly.

Q. You stated that on this exhibit, the soldering iron, it is not indicated anywhere that it is approved by the National Board of Underwriters?

A. If there is an approval, I didn't see it. There may be an Underwriter's label someplace on there, but I didn't see it.

Q. Does that label mean much?

A. It means to me about as much as your Supreme Court decisions mean to you, and it means you have a great deal of respect for it.

(There were no further questions and the witness was then excused.)

HAROLD LITTLE

was then called as the next witness for the defense, and having previously been sworn, then testified as follows:

Direct Examination

Q. (By Mr. Taylor): I believe you are the same Mr. Little that testified here at the request of the Government a few days ago? A. Yes.

Q. And I believe at that time you testified that you had been an electrician for approximately eight years? A. Yes, sir. [434]

Q. Are you following that occupation at the present time? A. Yes, sir.

Q. What training do you have in regard to electrical work?

A. Well, I actually got part of that out of the service as a radio mechanic.

Q. Did your training then give you a knowledge, a practical knowledge of electricity principles?

A. Well, more or less the theory there of electricity.

Q. Then you have had practical work too, have you? A. Yes.

Q. And I believe you stated that you lived at Kotzebue? A. Yes.

Q. And that you were acquainted with a building known as the Kotzebue Grill? A. Yes.

Q. How long have you lived at Kotzebue?

A. Well, it has been off and on for the last four years. I have been there for the last three almost complete.

(Testimony of Harold Little.)

Q. What kind of a light plant do they have at Kotzebue at the present time?

Q. They have three units there of 250; two of them Fairbanks-Morse and a Caterpillar KW.

Q. And is that an REA financed operation?

A. Yes, sir.

Q. Do you know what voltage is put out to serve the consumers or house [435] users or domestic users?

A. You can have three phase. There is a four-wire system.

Q. What is the voltage?

A. Well, I think either way with that system it would be 110 or 220.

Q. 220 is for cooking units, is it not, mostly?

A. Yes.

Q. And you say 110?

A. Well, to 115.

Q. And that is for your ordinary domestic users?

A. Yes.

Q. Now, were you in Kotzebue on the 25th day of December, 1957? A. Yes, sir.

Q. Did you happen during that day to be at the Kotzebue Grill, at the Grill building?

A. I was there the night of the fire.

Q. When did you first learn of the fire?

A. I don't know the particular time. It was just after the bell was rung, a few minutes after that.

Q. When you heard the bell ringing what did you do?

A. Well, I didn't know exactly where it was, but I was getting dressed to go out, and Margie

(Testimony of Harold Little.)
Lincoln came in at that time and told me it was the restaurant.

Q. When you learned it was the Kotzebue Grill, what did you do?

A. Well, I went right down to the fire.

Q. What part, if any, did you take in fighting the fire? [436]

A. Well, first I entered through the north side of the building, went into the kitchen and from there through the outside and then up the stairs and back to the fire area.

Q. How long did you remain up there, Mr. Little?

A. Well, I left right out of there, just in a few minutes or maybe less, because there was some empty pails there and I took them back down with me and went back down into the kitchen and relieved Gene Starkweather who was bailing out water there.

Q. How long did that continue?

A. Well, I remained there for some time.

Q. What would you say, what would you estimate that time to be?

A. Approximately ten minutes.

Q. About how long did it take to get the fire out?

A. Well, I was down there and pretty soon there were no pails to be used; they weren't coming back. So I went out to investigate why they weren't coming back and then by that time they had a bucket brigade coming from the beach.

Q. Now did you have anything to do in regard

(Testimony of Harold Little.)
to the electric distribution system in the Kotzebue Grill building that evening?

A. It wasn't until three o'clock the following morning.

Q. What did you do at that time, Mr. Little?

A. Well, they came back over—I had went back to bed—and they came over to get me again.

Q. By "they" who do you mean?

A. Well, it was Charlie Wilson that came in, followed by Steve in just a few minutes. [437]

Q. Then, following their call at your place, what did you do?

A. Well, I went down there to put the lights on, get the electricity back on.

Q. What did you have to do to put the lights on?

A. Well, I went upstairs first, into the one room which is right directly over the kitchen, and there is a ventilator there and that one extension in there. I was going to run a feeder into the front part of that room, and there was a cord in there which was just a standard light cord, and I was going to make connections from the middle hallway down through the rest of the hall to connect on to the distribution panel.

Q. By use of the word "ventilator" do you mean the trap door in the ceiling?

A. No. This is in between the kitchen.

Q. On the second floor, is that right?

A. Yes.

Q. Did you have occasion to go into the attic?

(Testimony of Harold Little.)

A. I did. I went up through the burned area trap door and went forward, and there was one of the native boys with me, and I don't know who he was. At least I don't recall who he was, but there was one boy who went up with me and he had a flashlight and I had one, and there is a partition forward of the burned area approximately two and a half feet high, something like that. At least you have to crawl over the top of it. And I was on the far side of that, toward the beach side, and I disconnected the wiring there, cut those wires off of that side, isolating the burned area.

Q. By doing that were you successful in getting the lights on in the building? [438]

A. Yes, I did. I got the lights on, but apparently most of the trouble was right down at the connection in the distribution center.

Q. Did you make an inspection of it?

A. Yes.

Q. What did you find?

A. I removed a single bolt and switch and I just twisted the wires together and we got lights. I did have to try the fuse a few times there and it did go on.

Q. Now, Mr. Little, you testified a few days ago, I believe, that the wiring of that building was in bad shape. Would you state from your inspection of that electric distribution system in the building as to what you found that caused you to have the opinion that it was very bad wiring?

A. Yes. It is very, very poor wiring.

(Testimony of Harold Little.)

Q. Just what did you find that you felt caused you to have that opinion?

A. Well, in the first place you have three-phase power coming in and they have a single meter for each phase. Rather than any entrance cable coming through, just some wires run out to the building and hook on to your service. That's for your entrance. Then below every one of your meter boxes you have double plugs, just screw-in type plugs, and that is your distribution. Then your wires will go in any direction.

Q. Before we go any farther, what would be, as an electrician, what would be your objection to that particular part of the distribution system that you have just mentioned?

A. Well, at least you should have some entrance cable, or better yet, some conduit coming in, and then use a three-phase meter, and then fuse boxes [439] of some description to isolate your circuit.

Q. What kind of switches did you have on the main line coming in?

A. Well, you ran through your meter boxes and then, I imagine those are 30 amperes, 30 amp.

Q. Continue. Now what else did you, in your inspection of this distribution system, find that was not accepted practice?

A. Well, in any of your places upstairs you have a combination of tube and knob wiring.

Q. Will you just explain to the jury what tube and knob wiring is.

A. Tube and knob is a good installation if it

(Testimony of Harold Little.)
is made up right. But it is an old, old type of wiring. You never see it nowadays. Fifty years ago, yes, it was standard procedure. But it is outdated; there is no use for it now. They don't use that type of wiring. You might see it sometimes in temporary buildings, but that would be the size of it, in a temporary building, you would have it in six months use by a contractor or something like that, in a store building or storage.

Q. What is the danger in using tube and knob wiring?

A. It's just not in common use any more; it's not very practical.

Q. In addition to tube and knob wiring, what other type of wiring did you find?

A. Then they break right off from tube and knob and go to BX, and this BX is left floating, that metal part of your BX. There is no ground to it and it should be grounded.

Q. How much of that BX was used in the attic, did you notice?

A. Practically all of your switch legs, and then you run down your switch [440] legs and out to your different lights. That was all in BX, and it would branch off for each room. That is just the way they were going through there from your tube and knob wiring.

Q. How was this wiring placed or located in respect to the other wiring in the building?

A. Well, it wasn't actually a true tube and knob, just more or less two single conductors or

(Testimony of Harold Little.)
wires running down through the top of the building and then used the distribution off of that.

Q. Were there any lines that crossed other lines?

A. Well, there is bound to be in there.

Q. What type of crossing would they make with it?

A. I think if you went up there right now and looked you would see a piece of water pipe in this here tube and knob wiring.

Q. Is that accepted practice?

A. Not hardly.

Q. What would be the danger of that? Of using water pipes to put wires across?

A. Well, I don't know.

Q. Well, what other things did you see, if any, that was contrary to the accepted practice of wiring buildings?

A. Well, it was all very poor. There is nothing in there that is right. There just isn't. The wiring is extremely poor.

Q. Then from your inspection of that building and the wiring, what would be your opinion of it?

A. Well, there is no code for it, not written for any code; it's just too poor a grade of wiring. [441]

Q. Now did you inspect any of the fuses or fuse boxes?

A. Yes. When I went over there, apparently they had knocked out the fuses at some time or other, and they were all backed with pennies when I got over there.

Q. Do you know when those pennies were put in? A. No, I don't.

(Testimony of Harold Little.)

Q. Could they have been there for quite some time?

A. I don't know. I can assume—They were there when I was there. Joe was there too. He could have put them in then or previously, before that or at that time. I don't know.

Q. Had it ever been brought to your attention that there was trouble in the wiring in the building prior to that night?

A. Well I had helped out a few times there. Just a little over a year ago I did do some wiring there for Steve, to put his deep fryer on.

Q. What happened to the deep fryer?

A. Well they had this here 220 deep fryer and it was hooked up to a 110; it was 220 and should have been on a 220 circuit. So I just changed it around and gave them a 220.

Q. Are you familiar with the principle of the generation of heat by induction? A. Yes.

Q. I hand you, Mr. Little, plaintiff's Exhibit L. Could you state what that larger piece of wire is?

A. It's a piece of BX.

Q. What's that? [442]

A. This piece right here (indicating), is BX.

Q. What is that used for?

A. That is for electric wiring.

Q. But does that carry any current itself?

A. No. It should be grounded.

Q. But what does carry the current?

A. It would be your insulator wires. They were here at one time.

Q. Did you have insulated wires—one or more?

(Testimony of Harold Little.)

A. Two.

Q. Two or more? A. Two or more.

Q. Then you say one should be grounded?

A. Yes. One is a neutral.

Q. By neutral, what do you mean?

A. Well a neutral is—when you have power, your current goes out from the source and turns around and comes back. It goes out and lights your bulb up, or whatever you have it in, and comes back through the neutral. One is the hot side and the other one is the neutral.

Q. Now what would you say as to the connecting up of these neutral wires in that system? Were they connected properly?

A. Well, you can't hardly say; as I stated the wiring was poor.

Q. And when you say something is poor, you mean it is incorrect. Now Mr. Little, from your experience what would be your opinion as to whether or not these wires which came out of here have been subjected to considerable heat?

A. Well, they have been hot. [443]

Q. From an inspection of the piece you called BX could you state whether or not that had been from heat generated inside the BX or from heat generated exteriorly?

A. Well, I am just an electrician and that is getting out of my class; but I can definitely state this has been hot.

Q. And would you examine that piece of BX there and examine it to see, and state whether or not you see anything indicating that part of the

(Testimony of Harold Little.)
insulation has boiled out through the BX?

A. I, personally, right now—this has been taken apart, and I just couldn't.

Q. I mean, examine the BX and state if there is any indication that that has been heat so intense inside that the insulation has come through.

A. Well definitely there is insulation on the outside here. You can—this has been hotter than this part down here (indicating).

Q. Well, then you think it has been subjected to great heat? A. It has.

Q. What heat would have to be applied to that to burn the insulation off of those interior wires?

A. It would be induction heat.

Q. Induction heat? A. Yes.

Q. What degree of heat can be induced by induction?

A. Well for induction heat they have regular induction furnaces.

Q. This heat is on the same principle but not induced in the right place, is that correct?

A. That is right. [444]

Mr. Taylor: If your Honor please, I think this would be a good time to take a recess.

The Court: Yes. I expect you would like about fifteen minutes. Well, we are not too rushed for time. We will take a recess for fifteen minutes until approximately 3:20.

(Thereupon, at 3:05, the jury was duly admonished and court recessed for fifteen minutes.)

(Testimony of Harold Little.)

(After recess.)

(At 3:20 p.m. court reconvened and the trial of this cause was resumed. Both counsel stipulated to the presence of the jury and Mr. Little resumed the stand for further direct examination.)

Q. (By Mr. Taylor): Now, Mr. Little, when you went into the attic of the Kotzebue Grill on the morning, I believe it would be the 26th of December, and you say that you cut off some lines, how many lines did you cut off?

A. I just cut two single conductors off.

Q. Two single conductors? A. Yes.

Q. You didn't have to cut through any BX?

A. No. Just the lines to the lights in the rear part of the building.

Q. To where the fire occurred? A. Yes.

Q. And that was the extent of it?

A. Yes. [445]

Q. And when you cut this off, did it straighten out the electricity?

A. Well, the switch downstairs was burnt out.

Q. Had it been shorted or what?

A. Your load had killed it.

Q. You said it had burnt the switch out?

A. Yes.

Mr. Taylor: I believe that's all.

Cross Examination

Q. (By Mr. Hermann): Mr. Little, will you examine this diagram of the building?

(Testimony of Harold Little.)

A. Yes.

Q. Does that seem generally to illustrate the floor plan? A. Yes.

Q. Would you put an X where you cut this wiring?

A. Well it would be in the next floor above—before you——

Mr. Taylor: Just a minute. I might be wrong, but I thought we had another X on there. I am not too sure about that. There is something we put an X on.

The Court: There is an X here; that is in the same room.

Mr. Taylor: I think another symbol of some sort.

The Court: You could put the word "cut". It would be more illustrative.

Mr. Taylor: Or the word "cut."

The Court: That's what I just suggested.

A. I'm afraid you are missing a room here. About in here (indicating) you had a small storage room. [446]

Q. (By Mr. Hermann): Isn't that there?

A. No. That was where the fruit was and all that.

Q. This storage here (indicating), would that be it? A. No. It's on this side over here.

Q. Where would it be in relation to the bathroom?

A. Well, I don't recall. But something is wrong here, I know. I can't put my hand on it.

(Testimony of Harold Little.)

Mr. Taylor: Maybe the fact that here is the hatchway to the attic in the hallway?

A. Yes.

Q. (By Mr. Hermann): Could you show us where this cut would be?

A. Yes. It will be right close to this hatchway here (indicating); and this partition I climbed over in here. Then on this side I done this cutting, just over the top of that partition.

Q. Would you put "cut" on this? A. Yes.

(The witness marks the exhibit.)

Q. Now would you explain that—show us where you put the word "cut".

A. Right in here (indicating); just on the other side of this deal. You have to climb over the top here and then just on the other side here there is this switch leg that goes down to here (indicating).

Q. And that is where you cut it; and the partition would be between there, and this room would be then somewhere in here?

A. It would be on this side of the partition (indicating). [447]

The Court: Except in the attic above.

Q. (By Mr. Hermann): Well, now could you point an arrow in the direction the wire took off toward the site of the fire where you cut it.

A. It took off in this direction and then came back and went over to these other lights.

(The witness marks the exhibit.)

Q. Do you know how it came back and went over to the other lights?

(Testimony of Harold Little.)

A. No, I don't because I wasn't interested in that part of the building, because I just wanted to isolate that particular area.

Q. Now what kind of wire was it that you cut?

A. Single conductor BX stripped back.

Q. That was BX that you cut?

A. Well, it was stripped back BX. What I mean by that, probably you cut your BX and pulled it off and then you have a single conductor coming up; and then you go back to tube and knob, and there is some distance in between.

Q. Well, the wire leading into the attic, into the burned part of the attic, was that of the BX type? A. It was, yes.

Q. Now you stated you don't know when the pennies were put in the box?

A. There was pennies there when I arrived at the scene.

Q. Do you know whether anybody was working with that?

A. Well, Joe had been working on it. There might have been 20 people working on it.

Q. And you stated the switch had been burned out?

A. Yes. There was a switch which you could look at and see it was burnt. [448]

Q. Assuming that the lights, at the time of the fire, had been on in the back end there, the portion which you cut off, would that switch have to have burned out of that?

(Testimony of Harold Little.)

A. That switch apparently burnt out during the fire.

Q. With that switch burned out, would that light be out for good until the switch was fixed?

A. The lights were on and off a couple of times during the fire.

Q. Would the fact that the switch was burned out put them off for good?

A. That's what happened.

Q. That wire burned off during the fire or shortly after?

A. Well, it burned off during the fire while we were fighting it.

Q. Where was the water pipe that you mentioned that had wires in it?

A. Up in the attic, back a little bit farther this way (indicating).

Q. Is it near the place where the fire was?

A. No, it's farther over this way (indicating) in the building.

Q. Then there is no tube and knob in the fire area is there? A. No. That was BX.

Redirect Examination

Q. (By Mr. Taylor): Mr. Little, now you say the switch leg goes up to the place which you had cut off that circuit. What would cause that switch to burn out? A. Well probably an overload.

Q. Could that overload be either by a short or by induction building up? A. Either one.

(Testimony of Harold Little.)

Recross Examination

Q. (By Mr. Hermann): Just one question, Mr. Little. Could the overload be caused by any other reason? A. Well, I don't know.

Q. Is it possible that there could be another reason. A. Clear your statement, please.

Q. You testified that it could have been caused by a short or by induction, did you not?

A. It could be either one.

Q. Could it be anything else besides that?

A. What do you mean by anything else?

Q. For instance, too many appliances on it or something like that.

A. Well that would be a load.

Q. It could have been an overload then?

A. It was a 10 amp. switch.

Q. I see. No further questions.

Mr. Taylor: It is understood then, Mr. Little, that you may be excused from attendance if you wish to get back home.

A. I sure do.

The Court: Very well.

(There were no more questions and Mr. Little was excused from further attendance.)

GENE STARKWEATHER

is then called as the next witness for the defense and after being duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name please?

(Testimony of Gene Starkweather.)

A. Dwight Gene Starkweather.

Q. Where do you live, Mr. Starkweather?

A. In Kotzebue.

Q. How long have you lived there?

A. Almost three years.

Q. What is your occupation? Or occupations?

A. Pilot part of the time; prospecting; guide sometimes.

Q. You are also a flyer? A. Yes sir.

Q. How long have you lived in Alaska?

A. Oh, seven or eight years.

Q. Are you acquainted with Steve Salinas, the defendant in this action? A. Yes.

Q. How long have you known him?

A. Oh, let's see—about two years I guess.

Q. Where was that acquaintance?

A. Kotzebue.

Q. Now were you in Kotzebue on the 25th day of December, 1957?

A. Yes, I was there Christmas.

Q. Calling your attention to the evening, late in the evening of that date, did anything unusual happen, Mr. Starkweather?

A. There was a little fire there.

Q. Do you remember and can you state about what time that fire occurred?

A. The exact time, no. [451]

Q. Approximately?

A. In the middle of the night.

Q. Where were you when you first heard there was a fire?

(Testimony of Gene Starkweather.)

A. I was up at Stocker's cafe with Tommy Goodwin.

Q. When you heard the fire alarm what did you do? A. I didn't never hear the alarm.

Q. You didn't ever hear the alarm? When did you first hear of the fire?

A. Margie Lincoln came running in and told me there was a fire, Tommy and me. We just followed her down.

Q. What?

A. We had just left her down the street at Pete Lee's Pool Room and she went in there to Dan's.

Q. Tommy—who did you say the name was?

A. Goodwin.

Q. What did you and Tommy do?

A. Took off down there.

Q. When you arrived at the Kotzebue Cafe what, if anything, did you see there?

A. Well, I seen a fire glowing up above there, above the corner where the stack is, and I thought maybe it was a stack fire. I kicked a window out there and went in and a couple of other boys went in there, but I am not sure who they were.

Q. Where was the window located that you kicked out and went it through?

A. On the kitchen.

Q. Into the kitchen? A. Yes. [452]

Q. When you got into the kitchen, what did you do?

A. I give one of the boys a flashlight and told him to find the baking soda and shut off the oil

(Testimony of Gene Starkweather.)
stove. And as soon as I got the stuff I doused it. We found a box and a half of baking soda and I kicked the lid loose and put the fire out.

Q. Why did you do that?

A. Like I say I thought it was a stack fire, and that puts them out.

Q. Baking soda will put out an oil fire?

A. Right now.

Q. Was one of the boys that went in there with you a Johnny Smith or Gene Smith or Isaac Snyder?

A. I am not positive on that. Like I say, I gave one of them my flashlight. Who it was I am not too sure of that. It's been quite awhile and I was pretty busy there—you know—for a few seconds. Whoever it was I gave him my flashlight. The valve for the stove was right there, and just as I finished shutting off the valve he handed me this box and a half of baking soda.

Q. Did you see Joe Brantley while you were there?

A. He came in just as I kicked the lid loose and put the soda in, because I had the lid loose and turned around and seen Joe.

Q. Was anybody in the downstairs of the Kotzebue Grill at the time you and this boy or boys went in there? A. No.

Q. You were the first one in the cafe?

A. In the cafe, yes. [453]

Q. Then what happened?

A. I went out the front door and went around

(Testimony of Gene Starkweather.)
and went upstairs. There was a whole bunch of them going in the door then. I went right in with them.

Q. What part of the building did you go into?

A. In where there was an attic hole there, an entrance trapdoor of some kind.

Q. What, if anything, did you see in that trapdoor? A. Lots of fire.

Q. Fire? A. Yes.

Q. Smoke?

A. Well, I didn't notice too much smoke; I just noticed the fire. I wasn't looking for smoke.

Q. What, if anything, did you and/or any of the others do in regard to getting up into the attic?

A. Well, there was a chair there. There was a case on it, a case of canned goods. I hopped on that and took one look in the attic and hopped back down, and I said I would see about some water, and I went back downstairs, and the boy that was working for Alaska Airlines — I don't know his first name—he is one of the Sheldon boys—he was coming up the street with some CO-2 bottles, and I took them upstairs and Tommy put Joe Brantley up in the attic and he started using them bottles, and I went back downstairs.

Q. Let's get back to these CO-2 bottles. How big are those bottles?

A. Oh, they stand approximately that high.

Q. And what are they made out of? [454]

A. Steel.

Q. And what about the weight of them?

A. Oh, the exact weight I don't know.

(Testimony of Gene Starkweather.)

Q. Now when Tommy handed the CO-2 bottle up to Joe Brantley, what did he do with it?

A. Well, he started using it. Well, he handed him one and he started using it, and just got a squirt out of it and dropped it back down and said it was empty; so I believe Tommy handed him the other one; and I tried the one that was supposed to have been empty, and it was not empty, and I told him that that one was not empty, and to put it back up when he finished the one that he was using, and I went downstairs.

Q. What would you say those weighed when they were full?

A. I don't know, thirty or forty pounds, I guess, something like that. Maybe not quite that but pretty heavy.

Q. When you went back down where did you go?

A. I went back into the rear part because there was a lot of boys there with buckets but not water, and there were three or four barrels in there full of water, in the cafe.

Q. Where were the barrels?

A. In the kitchen.

Q. Then what did you do and what did these other boys in the kitchen do?

A. Well, I took a big garbage can there and I started bailing water with a bucket and filled that up and they sent that upstairs, and by that time Harold Little come in and he said that he would bail, and I just kind of wandered around downstairs. [455]

(Testimony of Gene Starkweather.)

Q. What were you carrying the water in?

A. I didn't carry any water.

Q. You didn't carry any water?

A. It was just about that time somebody got a hole poked through the ice, right in front there.

Q. Then you had a bucket brigade?

A. Well, Tommy had that—in a few seconds they had it buckets going fast.

Q. Did you see Mr. Salinas there that evening?

A. During the fire, yes. I seen him.

Q. How was Mr. Salinas dressed?

A. Well, I don't usually pay much attention to how men are dressed. But he always dressed pretty neat.

Q. How were you dressed that night, Gene?

A. Oh I think I had on an old pair of jeans and an old jacket.

Q. How cold was it, if you know?

A. Oh, I would say approximately 35 below.

Q. Did you see Joe after Mr. Goodwin, Tommy Goodwin—is that his name? A. Yes.

Q. After Tommy Goodwin got him in the attic, did you see him later?

A. Yes, I seen him when I saw Mr. Salinas down in the kitchen part, and at the time Steve was talking to him about getting some boys to clean up there, get the water out and everything, because it was coming through the ceiling.

Q. Was the fire under control at that time?

A. Yes, it was. [456]

(Testimony of Gene Starkweather.)

Q. How long did you remain there that evening?

A. Well, I went home.

Q. Where did you live in relation to the Kotzebue Grill. A. Houses or feet?

Q. Both—feet or yards.

A. Approximately 200 feet from it.

Q. Do you live with anybody there?

A. Yes. I live with Harold Little.

Q. Now shortly after that, Mr. Starkweather, did you ever find any keys at your place?

A. Yes, I did.

Q. About what day was that following the fire?

A. Well, I don't know whether it was the day of the fire, the day before, or the day after, because I wasn't questioned about it, about the keys, until nearly two weeks later. One day is just like another day to me.

Q. How many keys were there?

A. There were three of them.

Q. What kind of holder was it, key ring on or key chain? A. Key chain, I believe.

Q. What, if anything, did you do with those keys?

9. Oh, they just kicked around the house there, and on the head of my bed, it's just one of them little shelves and I sort of hung these keys around there. In fact I even hauled them keys up to Point Lay and back.

Q. In a plane? A. Yes. [457]

Q. Did you find out who those keys belonged to or what building they were for?

(Testimony of Gene Starkweather.)

A. Well, I asked several people if they were theirs; Harold was one, and nobody knew then whose they were. About two weeks after the fire or thereabouts, Joe was over there one night——

Q. By Joe, you mean Joe Brantley?

A. Yes. And he was talking about keys, and he said he needed a round key. He wanted——

Q. Did he say what the round key was for?

A. Yes. He said he wanted to break in Steve's juke box but he didn't want to be stuck for breaking and entering.

Q. What did you do?

A. I was sitting on Harold's bed and Harold was sitting there. Joe was sitting on my bed, so I got up and walked over to the side of my bed and the keys were there on the shelf and I tossed them in Joe's hand and went over and sat down, and I said "will that key do you any good?", because one of them was similar to a round key. I don't know—it was just a phony looking key. And he looked at it and threw them over to me, because I was sitting on the other bed. Then it must have been a couple of minutes passed and he said, "let me look at them keys." So I handed them to him and he said they were keys to Steve's restaurant.

Q. Then what did he do with the keys?

A. I took them back.

Q. Was the key to the juke box on that key ring or key chain? A. I don't know. [458]

Q. You took the keys back?

(Testimony of Gene Starkweather.)

A. Yes, I took them back.

Q. What ultimate disposition did you make of the keys?

A. Well, Joe went over and got the sheriff and he took the keys and give me a slip for them, and that's when he questioned me too a little bit about the fire.

Q. You say the sheriff—do you mean the marshal, the deputy marshal? A. Yes.

Q. Then you gave them to him, to the marshal?

A. No. It was the next day I gave them to him. He asked me over to his office then.

Q. Did Joe Brantley still have his keys to the place?

A. He had a set of keys with him there that he matched with those.

Mr. Taylor: I would like to have this marked for identification.

(A paper sack containing sawdust is marked as defendant's Exhibit No. 11 for identification.)

Q. Now, Mr. Starkweather, I would like to have you take a look at that identification No. 11 and examine it and state, if you can, what that is. Can you state what that is?

A. It looks like that sawdust I brought down from Steve's attic.

Q. From Steve's attic? A. Yes.

Q. Did you get that sawdust yourself?

A. Yes, I did. [459]

Q. From whereabouts in the attic?

(Testimony of Gene Starkweather.)

A. From right below where they had cut a section of wiring out, where the fire was burning. In fact it was from the worst of the burn right there.

Q. From where it was burned the worst—where the greatest heat was? A. Yes.

Mr. Taylor: I would like to introduce this in evidence, your Honor, as defendant's Exhibit No. 11.

The Court: Was it shown when this was taken?

Q. (By Mr. Taylor): When was this taken, since after the fire?

A. Yes. That was taken Monday night.

Q. Monday night of this week?

A. Yes, sir.

The Court: Is there any objection, counsel?

Q. (By Mr. Taylor): At whose request was that taken?

A. Fred Crane's. I got a letter from him and he asked me if I would go in and bring him a couple of pounds of sawdust down from the attic.

The Court: Any objection, Mr. Hermann?

Mr. Hermann: I have no objection.

The Court: It may be received.

(Defendant's Exhibit No. 11 is received in evidence.)

Mr. Taylor: Now could I have the chart.

(One of the exhibits is given to Mr. Taylor.)

Q. (By Mr. Taylor): Now, Mr. Starkweather, plaintiff's exhibit F purports to be a floor plan of the second floor of the Kotzebue Grill building. This purports to be the manhole or trapdoor going into the attic (indicating). Would you just mark on

(Testimony of Gene Starkweather.)

there with the symbols "s" and "d" approximately where you got the sawdust.

(The witness marks the exhibit.)

The Court: I was just thinking, counsel, for purposes of illustration, we have some photos of the attic. This is not the floor plan of the attic. The photos might be more illustrative.

Mr. Taylor: We have an orientation point in the manhole—see.

The Court: Yes. I see. Very well.

Mr. Taylor: And he said he took the sawdust from the highest point of flame, where the fire was the worst, which would be right in here.

The Court: At least that's the way it appeared to me.

Q. (By Mr. Taylor): Yes, you can show about where that was. I will hold that up and will you point out to the jury the place approximately from where you took the sawdust.

(The witness points on the exhibit.)

Q. And will you point out then the manhole or trapdoor?

A. That's the one there (indicating).

Mr. Taylor: Did the jury see that all right?

(The jury members nod affirmatively.) [461]

Cross Examination

Q. (By Mr. Hermann): You testified that when you got there you broke in a window. Is that correct? A. That's right.

Q. Prior to that time you had not seen Mr. Brantley? A. No, I hadn't.

Testimony of Gene Starkweather.)

Q. Is it possible he could have been in and out f the kitchen shortly before you broke in the win-ow? A. No.

Q. Why not?

A. Everybody was standing outside hollering where's Joe? He's got the keys."

Q. What does that indicate? Maybe he was up-tairs. A. Joe wasn't there then.

Q. How do you know? Did you go upstairs?

A. When I left the lower part I did. Joe had ust got there.

Q. How did you leave the kitchen?

A. I went out the front door of the building.

Q. Did you try the side door? A. No.

Q. You don't know then whether it was locked or nlocked. A. I unlocked the door I went out.

Q. Would you just answer the questions, please. ou don't really know then when you found these eys you mentioned? A. No, I don't. [462]

Q. Could it have been as long as a week after he fire?

A. It was nearly two weeks when the marshal uestioned me about when I found the keys, and rying to remember back for such a small matter, t's just impossible. I didn't know whose keys they vere; there was nothing exceptional, and I just had othing to tie it down to the exact day.

Q. Well, if you don't remember when, how do ou know it was two weeks when the marshal ques-ioned you?

A. Just a little bit after I found the keys I went

(Testimony of Gene Starkweather.)
to Point Lay, and up to then I hadn't identified them at that time.

Q. When did you go up to Point Lay?

A. I believe it was three days after the fire.

Q. So all you can say is that you had them sometime before you went up to Point Lay three days after the fire?

A. Um-hum. I couldn't say I found them before the fire or even after. I don't know for sure.

Q. You don't know when you found the keys?

A. No.

Q. You found them on the bed, did you?

A. Yes.

Q. And they remained in your possession from the time you found them—is that correct—until the marshal took them?

A. Part of the time I had them in my pants. Originally I thought they were Harold's, and I put them in my pants, and after I asked him about it, I tossed them just up to the head of my bed there, on the shelf. From then on they just laid there. [463]

Q. And you don't know whether that was before or after the fire they just laid there?

A. That was after the fire.

Q. Was that after your trip to Point Lay?

A. What?

Q. Well, up until your trip to Point Lay they were in your pocket? Is that correct?

A. Yes. That's from the time I found them on the bed.

Q. Have you been up to Kotzebue recently?

(Testimony of Gene Starkweather.)

A. I just came through there.

Q. Had you been staying there recently?

A. I just came from Point Hope.

Q. You were in Kotzebue Monday, were you?

A. Yes.

Q. How long did you remain there on that occasion? How long were you in Kotzebue?

A. Until I got the plane down here day before yesterday.

Q. Do you know what the temperature has been in Kotzebue during the daytime?

A. Well, it gets pretty wet.

Q. What has it been? A. I don't know.

Q. Do you fly? A. Yes.

Q. When you fly do you keep track of the temperature? [464]

A. When I am flying, yes.

Q. Has it been warmer than it was in December? A. Quite a little bit.

Q. Did you take the sawdust yourself from the attic? A. Yes.

Q. Who was present when you did so?

A. No one.

Q. And has that sawdust been in your possession since then?

A. Until I gave it to Fred when I got down here.

Q. When was that? A. Two days ago.

Q. Can you be absolutely certain that it is the same identical sawdust?

A. It sure looks like it.

(Testimony of Gene Starkweather.)

Q. Could anything have been added to it without your knowledge? A. Oh yes.

Mr. Hermann: No further questions.

Redirect Examination

Q. (By Mr. Taylor): Mr. Starkweather, where did you say you found the keys?

A. On my bed.

Q. Do you know who lost them?

A. No, I don't. It's possible though that Joe lost them over there because he come over there the night of the fire.

Q. About what time?

A. I don't know. He came over there—it might have been an hour or so after the fire. [465]

Q. What did he come over for?

A. He wanted to get my old parka to work in when he was up there because he didn't have one.

Q. Did he get the parka?

A. Yes. He had it for a little over a week.

Q. Did he get anything else? When he got the parka did he get anything else that night?

A. I think he had a cup of coffee when he came over and got the jacket.

Q. What bed or place did he sit down while he was in there? A. I don't remember.

Q. Do you remember whether or not he sat at the place where you found the keys?

A. No, I don't.

(There were no further questions and the witness was excused from the stand.)

RUTH NORTON

was then called and sworn as the next witness for the defense and then testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you tell us your name please. A. Ruth Norton.

Q. Where do you live, Ruth?

A. Kotzebue.

Q. How old are you? [466] A. 18.

Q. How long have you lived in Kotzebue?

A. I don't quite remember.

Q. What? A. I don't know.

Q. Lived there a long time, have you?

A. Um-hum.

Q. Were you living at Kotzebue in the Christmas of 1957 of last year? A. Um-hum.

Q. Do you live with your folks there?

A. Yes.

Q. Now do you remember on the evening of Christmas Day of a fire at Kotzebue?

A. Yes.

Q. Do you know where that fire occurred?

A. Yes.

Q. Where did that fire happen, Ruth?

A. You mean where it happen?

Q. Yes. Where did the fire happen? Where was the fire? A. Must be upstairs.

Q. Where? A. In the restaurant upstairs.

Q. In the Kotzebue Grill?

A. Yes, Kotzebue Grill.

Q. Now, Ruth, calling your attention to earlier

(Testimony of Ruth Norton.)

in the evening, did you [467] have any—did you pass by the Kotzebue Grill? A. Yes.

Q. Can you remember what time it was that you passed there? A. Just about seven.

Q. About what? A. About seven.

Q. Do you mean seven in the evening?

A. Yes.

Q. Where had you been, Ruth, before you passed there? A. I came from home.

Q. Where were you going?

A. To the Ferguson's store.

Q. Now when you passed by the Kotzebue Grill will you state whether or not you saw any lights?

A. I saw lights in the kitchen.

Q. You saw a light in the kitchen? A. Yes.

Q. Did you see anybody else there, near the Kotzebue Grill, at the time you went by?

A. I just passed.

Q. Who? A. Martha.

Mr. Hermann: I didn't get that name.

Q. (By Mr. Taylor): What was Martha's last name? [468] A. Martha Hanks.

Q. Martha Hanks? A. Yes.

Q. Did you talk with Martha Hanks at that time? A. No.

Q. What did you say?

A. I just say "Hi" and we passed.

Q. Just a greeting as you passed?

A. Yes.

Q. The only light then that you saw was in the kitchen of the Kotzebue Grill? A. Yes sir.

(Testimony of Ruth Norton.)

Q. You say that was about seven o'clock?

A. Yes sir.

Q. Did you pass by there again that night?

A. No.

Q. That was the only time? A. Yes.

Mr. Crane: Just another question or two, your Honor.

Q. (By Mr. Crane): Did you see any lights shine out of any of the windows upstairs?

A. No.

Q. It was dark up there? A. It was dark.

Mr. Taylor: You may take the witness. [469]

Cross Examination

Q. (By Mr. Hermann): Ruth, you say this was about seven? A. Yes.

Q. Now, "about" — what do you mean by "about"? Do you mean that it was earlier, that it could have been earlier?

A. Well, around seven I think.

Q. Was it exactly seven?

A. Not quite. I started from home and came to town, it was 6:30 and passed through about seven.

Q. You came toward town from your home at 6:30? A. Yes.

Q. How long does it take to get to town?

A. I don't know.

Q. But you figure it was about seven before you got to town?

A. Yes. I figure it was about seven.

(Testimony of Ruth Norton.)

Q. Could it have been a little later? Or could it have been a little earlier?

A. Just about seven.

Q. You looked at the time before you left?

A. I did.

Q. And did you see anything at all besides a light in the kitchen? A. No.

Q. You couldn't see anybody in there?

A. No.

Q. Did you actually look upstairs to see if there was a light? [470]

A. There was nothing there.

Q. Did you look?

A. I looked. There was no light.

Q. Why did you look? A. I don't know.

Q. What were you looking for? Someone?

A. No.

Q. How did you happen to look up there?

A. When I see that light in the kitchen I happen to look up.

Q. Were you looking for someone in particular?

A. No.

(There were no further questions and the witness was excused from the stand.)

MARTHA HANKS

was then called as the next witness for the defense and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you please tell us your name, Martha? A. Martha Hanks.

(Testimony of Martha Hanks.)

Q. Where do you live Martha?

A. Kotzebue.

Q. How long have you lived there?

A. Six years now.

Q. About six years? A. Yes. [471]

Q. How long have you—Before you came to Kotzebue, where did you live? A. Point Hope.

Q. Were you born at Point Hope?

A. Yes.

Q. How old are you, Martha?

A. Seventeen.

Q. Now were you living in Kotzebue last Christmas? A. Yes.

Q. You lived with your parents there?

A. Um-hum.

Q. Now do you remember a fire at Kotzebue on Christmas Day or the night of Christmas?

A. I was home. I was home that evening. My sister was out.

Q. And she saw that fire? Do you remember the fire taking place, do you, Martha?

A. No.

Q. You didn't see it?

A. I didn't see it. I had no baby-sitter by that time.

Q. But you do know that a fire did occur on that night? A. Um-hum.

Q. Now, Martha, calling your attention to earlier that day, earlier that evening, were you at any time near the Kotzebue Grill?

A. I was at the Grill about 6:15.

Q. 6:15. Where had you been?

(Testimony of Martha Hanks.)

A. I went to Ferguson's and stayed there for awhile. [472]

Q. What time did you leave Ferguson's?

A. Fifteen after seven.—Fifteen minutes to seven I went home.

Q. What?

A. Fifteen minutes to seven I went home.

Q. Then when you left Ferguson's did you pass the Kotzebue Grill on your way home?

A. I didn't pass over that way; I walked toward Hansen's way.

Q. Did you see anybody near the Kotzebue Grill? A. No.

Q. What? A. No.

Q. Do you know Ruth Norton? A. Yes.

Q. Did you see her that evening?

A. I didn't see her then but I saw her about 6:15 there by Ferguson's.

Q. You saw her about 6:15 then? A. Yes.

Q. How far is Ferguson's from the Kotzebue Grill? A. Right next door to it.

Q. So you were right close to the Kotzebue Grill. Is that right? A. Yes.

Q. Now at the time you talked to—Did you talk to Martha, or to Ruth rather?

A. I was talking to Ruth.

Q. Did you talk to her? [473] A. Yes.

Q. What did you say?

A. Her and I was having jokes there, teasing each other.

Q. Where was that? What time was that?

(Testimony of Martha Hanks.)

A. Right outside Ferguson's.

Q. You had what?

A. We were teasing each other there.

Q. How long did you talk there?

A. We talked for about ten minutes. Then we walked in Ferguson's.

Q. You went into Ferguson's? A. Yes.

Q. Did you happen to look into the Kotzebue Grill when you went by it? A. No.

Q. Did you see any lights there?

A. I didn't see no lights there.

Q. Was the front of the place dark?

A. Um-hum.

Q. Did you see any lights shine from the upstairs windows? A. No.

Q. You think you were there a few minutes with Ruth though, about the time you went by there?

A. Yes.

Q. You think maybe it was five minutes?

A. I think so.

Q. Was it pretty cold that night? [474]

A. Yes, it was kind of chilly out. We walked in.

Cross Examination

Q. (By Mr. Hermann): Did you see Ruth before or after you went into Ferguson's?

A. I saw Ruth there.

Q. When was it? Before or after you went into Ferguson's? A. Before we go into Ferguson's.

Q. That was before the first time you went into Ferguson's? What time was that?

(Testimony of Martha Hanks.)

A. 6:15.

Q. How did you know it was 6:15?

A. I had a wrist watch by me that time.

Q. Did you look at it when you saw Ruth?

A. Yes.

Q. What time did you go inside Ferguson's?

A. About 6:30.

Q. You were out in front about fifteen minutes?

A. Yes.

Q. Was there any particular reason you were watching the time?

A. My dad told me to go home before seven, so I keep the watch.

Q. Now you say you don't recall seeing a light in the Kotzebue Grill?

A. No. I didn't see no light.

Q. Did you look in?

A. Yes. We looked in but we didn't see anybody in there.

Q. What did you look for? Were you looking for somebody? A. No. [475]

Q. Well, what caused you to look in?

A. We just peeked through the window.

Q. You just peeked through. What were you peeking for? A. I don't know.

Q. You must have been looking for something. Whose idea was it to peek in? Your idea or Ruth's?

A. We like to drink coffee there.

Q. You were looking to see if it was open?

A. Yes. And we didn't see anybody in there.

Q. Was there a light in the kitchen?

(Testimony of Martha Hanks.)

A. No light at all.

Q. Was there a light on upstairs? A. No.

Q. Are you sure of that?

A. I am sure. We saw the windows. There was no light there.

Q. The front window. Could there have been a light in the back?

A. I don't know. We didn't look in the back.

Q. Just in the front? A. Yes.

(There were no further questions and the witness was excused from the stand.)

The Court: Well, we have been in session about an hour now. We will take a brief recess before finishing up for the day.

(Thereupon the jury was duly admonished and Court recessed at 4:20 for ten minutes.)

After Recess

Both counsel stipulated to the presence of the jury and all other persons necessary being again present the trial of the cause was resumed.

ISAAC SNYDER

was then called as the next witness for the defense and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you state your name, please. A. Isaac Snyder.

Q. Where do you live, Isaac?

A. Kotzebue.

(Testimony of Isaac Snyder.)

Q. How long have you lived there?

A. Since 1949.

Q. How old are you Isaac? A. 19.

Q. Were you living at Kotzebue Last Christmas day, Christmas in 1957? A. Yes sir.

Q. Do you recall a fire occurring the night of that day? A. Yes.

Q. Now calling your attention to earlier in the evening. Were you in the town of Kotzebue?

A. Yes.

Q. Calling your attention to six o'clock or about there, where were you?

A. At six o'clock I was at Pete's. [477]

Q. Pete what?

A. I was shooting pool at Pete's.

Q. Pete Lee's pool room? A. Yes.

Q. Where does that pool room—where was that pool room in relation to the post office?

A. It was in behind the post office.

Q. Back of the post office? A. Yes.

Q. How far was that pool room from the Kotzebue Grill?

A. Not very far. About fifty yards or less than that.

Q. How far?

A. Not too far, just next door, across.

Q. Now how long did you stay at Pete Lee's pool room that evening?

A. Before the movie start. I went to the movie, I passed through there.

Q. What time was that?

(Testimony of Isaac Snyder.)

A. About ten after seven or something like that.

Mr. Hermann: Pardon. I didn't hear you.

A. About ten after seven.

Q. (By Mr. Taylor): You passed then, by there, going to where? A. Ferguson's.

Q. To Ferguson's? A. Yes.

Q. Then when you left Pete Lee's pool room did you walk towards the [478] Kotzebue Grill?

A. Yes.

Q. And you passed along in between the Kotzebue Grill and the post office? A. Yes.

Q. As you went along there would you state whether or not you saw any lights or illumination in the Kotzebue Grill building?

A. Yes. You can notice it.

Q. What did you notice?

A. You see a light shining right on the roof.

Mr. Hermann: I didn't hear that answer.

Q. (By Mr. Taylor): Would you speak up a little louder, please. Will you repeat your answer and state what you did see.

A. You can notice the light shining on the road.

Q. Where was those lights coming from?

A. Upstairs.

Q. Upstairs where?

A. The upstairs window.

Q. The upstairs window? A. Yes.

Q. After you walked by, past the side of the Kotzebue Grill, which way did you turn when you came to the main street? A. To the left.

Q. You turned left and you passed in front of

(Testimony of Isaac Snyder.)
the building? A. Yes. [479]

Q. Did you notice any lights from that end?

A. You can still see lights in there; there is another window on that side.

Q. Out of what window?

A. On the front.

Q. But what window? A. Upstairs.

Q. The upstairs window? A. Yes.

Q. Then, how long do you believe it took you to walk from Pete Lee's to Ferguson's store?

A. About three minutes.

Q. During those few minutes did you notice those lights were on all that time? A. Yes.

Q. Then after that what did you do after you went to Ferguson's store?

A. I went to the movie.

Q. You went to the movie? Is that right?

A. Yes.

Q. You went inside Ferguson's store?

A. Yes.

Q. Where were you when the fire started Isaac?

A. The movie was over then.

Q. What?

A. The movie was over then. I was at Ferguson's. [480]

Q. Was it at Ferguson's that you went to the movie? A. Yes.

Q. The movie was over then, when the fire was going on? A. Yes.

Q. Did you go to the movie? A. Yes.

Q. After the movie was over the fire started, is

(Testimony of Isaac Snyder.)
that right? A. Yes.

Q. What did you do?

A. When it started I was in there shooting pool and we see there is a fire out there and we went out.

Q. Did you go over to the fire? A. No.

Q. What did you say?

A. No. I didn't go to the fire. I was watching it.

Q. You didn't go to the fire?

A. No. I was watching it.

Q. You were watching it though? A. Yes.

Mr. Taylor: You may take the witness.

Cross Examination

Q. (By Mr. Hermann): Now what time did you leave Pete Lee's pool room?

A. About ten after seven.

Q. Ten after seven. What time was it you had first come to the pool room?

A. About six. [482]

Q. You stayed there over an hour?

A. Yes.

Q. How did you happen to remember that was ten after seven? Was there any particular reason?

A. It was before the movie, I went out.

Q. What time does the movie ordinarily start?

A. 7:30.

Q. Does it start the same on Christmas as it does every day? A. Yes.

Q. Was that just the regular movie?

A. Yes.

Q. Does it start at the same time on Sundays as it does every day?

(Testimony of Isaac Snyder.)

A. On Sundays it starts at a quarter to eight.

Q. On Christmas they kept weekday hours? Is that correct? A. Yes.

Q. So you are basing your time on the movie then? A. Yes.

Q. No further questions.

(There were no further questions and the witness was excused from the stand.)

JOHNNY SMITH

was then called as the next witness for the defense, and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Johnny, when you answer the questions will you speak up so the Court and jury can hear you. Now would you tell them your name? A. John Smith.

Q. Where do you live Johnny?

A. Kotzebue.

Q. How long have you lived there?

A. Twenty-seven years.

Q. Seven years?

A. Twenty-seven years.

Q. Were you born there? A. Yes sir.

Q. One of the old timers there. Were you living in Kotzebue on the Christmas Day of last year, 1957? A. Yes sir.

Q. By the way, how old are you?

A. Twenty-seven.

Q. Do you remember a fire occurring in Kotze-

(Testimony of Johnny Smith.)

bue on December 25, 1957? A. Yes sir.

Q. Now calling your attention to earlier in the evening of that day, were you in the town of Kotzebue? A. Yes sir.

Q. Where do you live, Johnny, in regard to, say, the downtown part of Kotzebue? How far do you live?

A. Oh, about three blocks north, I guess.

Q. Calling your attention to six o'clock or later in the evening, where were you about that time?

A. I was at Pete Lee's pool room.

Q. What were you doing there Johnny?

A. Oh, I was in the living room visiting Robert Lee and his wife.

Q. How long did you stay at Pete Lee's pool room?

A. Oh, until about show time I think.

Q. What time would that be?

A. Oh, about 7:15 I guess.

Q. What time did you leave Pete Lee's pool room? A. 7:15 about.

Q. When you left Pete Lee's pool room would you state whether or not you passed the Kotzebue Grill? A. I did.

Q. When you came out of Pete Lee's pool room, could you see the Kotzebue Grill from Pete's?

A. Yes.

Q. When you then went to Ferguson's did you have to walk by the side of the Kotzebue Grill?

A. Yes, you have to.

Q. Now would you state whether or not any

(Testimony of Johnny Smith.)

part of the building known as the Kotzebue Grill was lit up, that lights were on?

A. Yes. The front part upstairs.

Q. Upstairs? A. Yes.

Q. Where were you when you first noticed the lights were on upstairs?

A. About under the building I guess.

Q. Right up to the building? [485]

A. Yes. Fifty feet from it I guess.

Q. When you walked by the building, which way did you turn? When you got to the front of the building. A. I turned left.

Q. That went toward the show house, did it?

A. Yes.

Q. Did you see lights at the front of the building? Will you state whether you saw any lights in the building from that end?

A. I just walked down there. It was so cold I was hurrying along.

Q. I mean did you see any lights shine out of the building from the front?

A. I imagine there would be lights because the same room is right there in front.

Q. The same room you saw from the side?

A. Yes. There are two more windows on the front.

Q. Did you see any lights on the ground floor in the kitchen? A. No.

Q. Now did you hear the fire bell ring, Johnny?

A. No, not right away.

Q. Where were you at the time of the fire?

(Testimony of Johnny Smith.)

A. I was at Ferguson's.

Q. Where. A. Ferguson's.

Q. How long after the fire started was it before you knew anything about it. [486]

A. I would say about five minutes I guess.

Q. What did you do after the fire started?

A. I didn't know what was happening. I went out and it was pretty dark. I seen people hurrying around and running around and I started going around where the fire was.

Q. Did you find out where it was?

A. Yes. They said it was upstairs where the supplies were. I didn't know exactly where though.

Q. What did you do, if anything, in regard to the fire, Johnny?

A. Oh, I don't know what to do for awhile. There was nothing to do, it was so dark. Pretty soon they started hauling water and I started helping them.

Q. You started carrying water right on the stairway there? Helped put the fire out?

A. Yes.

Q. Did you see Steve Salinas while you were there?

A. Oh, that was much later when the fire was under control.

Q. When the fire was under control?

A. Yes.

Q. Steve was up there?

A. Yes. I seen him.

(Testimony of Johnny Smith.)

Cross Examination

Q. (By Mr. Hermann): I hand you, Mr. Smith, plaintiff's Exhibit A-5 and ask you to point out where it was that you saw the light.

A. It was on the side there (indicating). [487]

Q. On the side? A. Yes.

Q. I believe there is a side picture here that will how that. Would it be one of these?

A. This one here.

Q. Will you point that out to the jury.

A. Exhibit A-1.

Mr. Taylor: Just a minute, Mr. Hermann, could I take a look to see where he saw the light.

A. The one on the far right (indicating).

Q. (By Mr. Hermann): When you were in front of the building could you still see that light?

A. Not from the ground.

Q. You couldn't see it from the front?

A. No.

Q. Now in the Grill, could you see any lights in the lower part of the front there? At this point here (indicating). I am pointing to A-5. Again, you couldn't see any light?

A. Not on the bottom there.

Q. Do you know whether there are any shades on those windows? A. I don't know.

Q. Is there usually?

A. I think so. I am not sure though.

Q. Could there have been a light on and you couldn't see it through the shades? [488]

(Testimony of Johnny Smith.)

A. Which one?

Q. You were referring to the bottom, the bottom part there.

A. No. There was no light.

Q. You didn't see any? A. No.

Q. Was there any particular reason you noticed these lights?

A. No. The only reason I noticed them, I started thinking how cold it was. There was a lot of frost on the window there.

Q. A lot of frost on the windows?

A. Yes.

Q. Would there be enough frost to block out the lights? A. No.

Q. Now do you base your time on the time the show started? A. Yes.

Q. What time does the show normally start in Kotzebue? A. 7:30.

Q. Does it start at 7:30 every night?

A. No.

Q. What nights doesn't it?

A. Except on Sundays.

Q. Any other night of the week?

A. Sundays and Wednesdays.

Q. What day was Christmas?

A. Thursday.

Q. What time does it start on Sundays and Wednesdays? [489] A. 8:15.

(There were no further questions and the witness was excused from the stand.)

Mr. Crane: If your Honor please, I believe

there are some matters I would ask to take up the Court, matters not connected with this case. May we excuse the jury.

The Court: Very well. It is about time for adjournment for the day. Also, we seldom attempt to hold court on Saturdays unless there is a grave emergency or counsel request it. A five-day week is supposedly a court week, so that we will continue this case then on Monday morning.

(The jury was then duly admonished and thereupon excused until the following Monday morning. Court remained in session for other business.)

Be It Remembered that at 10:00 a.m., Monday, April 28, 1958, Court reconvened, all persons necessary again being present.

The Court: Before proceeding with the trial, in the case of United States vs. Lee Andrew Williams, I should like to set for hearing Friday at 1:30 p.m. the motion of the defendant for judgment of acquittal. Friday, at 1:30. I appreciate the brief submitted by counsel and the copy to conform to our rules. Attorneys sometimes overlook that but it is very helpful to have copies.

We will proceed then with the case of United States vs. Salinas, the defendant being present.

(Both counsel then stipulated that the jury were all present.)

The Court: We will then proceed with the defense in the case.

CLARA SALINAS

is then called as the next witness for the defense and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you please state your name? A. Clara Salinas.

Q. So that the jury and court can hear, Mrs. Salinas, it will be necessary for you to talk fairly slow and speak up so that they can hear all your testimony. Where do you reside, Mrs. Salinas?

A. Kotzebue.

Q. How long have you resided there?

A. Since 1944, I believe. I don't remember. It was about '44.

Q. Prior to that, where did you live?

A. Selawik.

The Court: Would you permit an interruption. I notice that some of the jurors not engaged in this trial are here. Most of them know—but the jurors not engaged in this case need not report until Wednesday. They can be excused until Wednesday. You can check with us later, with the Deputy Clerk. Pardon the interruption. [491]

Q. (By Mr. Taylor): When you were living at Selawik, were you engaged in any business at that time? A. Yes.

Q. When did you first go into business?

A. In Selawik?

Q. In Selawik? A. Yes sir.

Q. When did you first engage in business at Selawik?

(Testimony of Clara Salinas.)

A. In the 1930s; since in the early 1930s. 1934, I believe it was.

Q. Was that with your former husband, Louie Rotman? A. Yes.

Q. What type of business was that, Mrs. Salinas?

A. General merchandise, the same as we are in now.

Q. Would that be hardware, groceries and so forth? A. Yes. Groceries—everything.

Q. Also a general store, is that right?

A. Yes.

Q. Then you say you moved to Kotzebue, is that right? In 1944? A. Yes.

Q. What did you do in Kotzebue?

A. We started up another store. We didn't exactly move. We kept the store in Selawik and started up another store in Kotzebue.

Q. Was it the same type of business, Mrs. Salinas? A. Yes.

Q. Do you now own a business in Kotzebue?

A. Yes.

Q. Do you own the building in which it is located? A. Yes.

Q. How big a building is that?

A. It's 40 x 100, two story.

Q. A two-story building? A. Yes.

Q. What business do you conduct in that?

A. General merchandise.

Q. That's hardware and various kinds of equipment and groceries, clothing and dry goods?

(Testimony of Clara Salinas.)

A. Yes.

Q. Do you also have a hotel or rooms in that building? A. Yes.

Q. Do you know the value of that building?

Mr. Hermann: I object, Your Honor. There is nothing to indicate that the Rotman store building is in any way material to the issues in this case.

The Court: I judge the purpose is to show comparative values of buildings in Kotzebue. If that is the purpose, it is permitted.

Q. (By Mr. Taylor): That's right. What would be the value of the building? Would you tell us, Mrs. Salinas, if you know.

A. The building?

Q. The building, yes. [493]

A. Well, between $200,000.00 and $300,000.00, I believe.

Q. Were you in Kotzebue at the time it was being built. A. Yes.

Q. Are you familiar with the values of property in Kotzebue? A. Yes. I should be.

Q. Now when did Mr. Rotman pass away?

A. 1955, March.

Q. You are now married to Mr. Salinas, Steve Salinas? A. That's right.

Q. Then since 1955 have you personally operated the business at Kotzebue and at Selawik?

A. That's right.

Q. In that operation do you order and have transported to Kotzebue various items that are or-

(Testimony of Clara Salinas.)

dinarily sold in general stores? A. Yes.

Q. You are familiar then with prices, and do you have access then to catalogues that give the values of various things that you handle?

A. Yes.

Q. Now calling your attention to around in December of 1957, do you know of your own knowledge what restaurant equipment was contained in the Kotzebue Grill? Had you been in that place a considerable number of times? A. Yes.

Q. Before I proceed any further, I would like to ask you one question. Have you had occasion to purchase and install restaurant equipment in any buildings of your own? [494] A. Yes.

Q. Do you have a restaurant now in Kotzebue?

A. Yes.

Q. You are familiar with prices of restaurant equipment? A. Yes, I should be.

Q. Now, referring back to the Kotzebue Grill in the month of December, 1957, could you give, do you have an opinion as to the value of the restaurant equipment only, in that building? Just say yes or no, if you have an opinion.

A. Yes.

Q. What is that opinion as to the value of the restaurant equipment contained in the Kotzebue Grill on or about the 25th day of December, 1957.

A. The value of the equipment only?

Q. That's right.

A. I would say $15,000.00, between $15,000.00 and $16,000.00.

(Testimony of Clara Salinas.)

Q. Between $15,000.00 and $16,000.00?

A. Something like that.

Q. Now Mrs. Salinas, do you know approximately the amount of meat and groceries that was on hand at the Kotzebue Grill on or about that day? A. Meat and groceries?

Q. Yes, meat and groceries.

A. In the restaurant, you mean?

Q. Yes.

A. It should be a couple of thousands of dollars worth.

Q. About two thousand dollars?

A. Yes sir. [495]

Q. Now did you, as a purchaser of groceries —you say you had purchased for your store, your own store—did you purchase any supplies or groceries for the Kotzebue Grill? A. Yes, I did.

Q. Did you have any groceries or supplies stored in your place on the 25th day of December?

A. Yes sir.

Q. About what was the value of those groceries?

A. Between six and seven thousand dollars.

Q. Now in reference to the building itself, Mrs. Salinas, the building known as the Kotzebue Grill, would you have an opinion as to the value of that building? A. The value of the building?

Q. Yes.

A. With the equipment and everything?

Q. No. You have already testified as to the value of the equipment in there, but as to the building itself? A. $25,000.00.

(Testimony of Clara Salinas.)

Q. Is that based on your knowledge gained through real estate transactions at Kotzebue?

A. That's right.

Q. And your own building experience?

A. That's right.

Q. So then you say the value of the building would be $25,000.00, I believe you testified. There would then be about $8,500.00 or $9,000.00 in groceries and $15,000.00 to $16,000.00 in restaurant equipment. Is that [496] about right?

A. That's right.

Q. Now Mrs. Salinas, coming back to the 25th day of December, 1957, taking from approximately noon of that day on, would you state what was the first time that you saw Mr. Salinas on that day, if you did see him?

A. Approximately what time was it?

Q. Yes.

A. It was around noon. Between twelve and one.

Q. Where did you first see him?

A. In the apartment.

Q. I believe you have some children, have you, Mrs. Rotman I mean Salinas. Pardon me.

A. Yes.

Q. And they are children by your previous marriage? A. That's right.

Q. Were they living with you at Kotzebue at that time? A. No.

Q. Were any of them living there?

A. No.

(Testimony of Clara Salinas.)

Q. Had any of them been living previously with you? A. Yes.

Q. Do you know where Mr. Salinas was living at that time, that is referring to December 25, 1957? A. In the hotel.

Q. In your hotel? [497]

A. Yes. That's right.

Q. What room, if any, was he occupying?

A. It was an unnumbered room. It was next to seven. It belonged to one of the girls.

Q. It belonged to one of the girls? One of your girls? A. Yes. It wasn't numbered.

Q. It had no number—then what room was it?

A. Well, it was next to seven.

Q. Next to seven? A. Yes.

Q. So then you saw Mr. Salinas around noon. And did he come to your apartment at that particular time? A. Yes.

Q. Then what did you do?

A. Well, we had coffee first, and we had breakfast.

Q. Did anybody else come to your apartment then or shortly after?

A. Not just then. But Mr. Amundsen was in there around 2:00.

Q. Who?

A. Mr. Amundsen, Jerry Amundsen.

Q. Who was Mr. Amundsen?

A. He was manager for Wien at the time.

Q. How long did he stay?

A. He didn't stay very long. He had a dinner

(Testimony of Clara Salinas.)

date I believe. Around 2:00 or shortly after.

Q. You say he stayed until 2:00? [498]

A. Yes.

Q. What did Mr. Amundsen do, if anything, while he was at your apartment?

A. He and Steve played crib for a little bit.

Q. And then he had a dinner engagement and he left? A. Yes.

Q. Then, following Mr. Amundsen's departure, what did you and Mr. Salinas do then?

A. Well, about three we started dinner, cooking dinner.

Q. What did you first do to start that dinner?

A. Well, we had to go downstairs and get the groceries.

Q. What groceries did you get downstairs, Mrs. Salinas?

A. Well I had a duck thawing out, and well, vegetables, like potatoes and everything. I had to get a pot of water, drinking water.

Q. What, if anything, did Mr. Salinas do while you went down to get the groceries?

A. Well, he came down and helped me carry them up.

Q. About what time was it that you got these groceries and the water and the duck back up to your apartment? A. It was around three.

Q. About three? A. Yes.

Q. Then what did Mr. Salinas do?

A. Well, he started preparing the duck and I started the vegetables and mixed a cake. [499]

(Testimony of Clara Salinas.)

Q. Did you mix up a cake? A. Yes.

Q. Mr. Salinas was fixing the duck?

A. Yes.

Q. In what way was he preparing it?

A. Well, he was preparing the dressing.

Q. He made the dressing and got it ready to roast, is that right? A. Yes.

Q. Was that a local duck or was that a duck brought in from the States?

A. A duck brought in from the States.

Q. So then after you had made this cake and Mr. Salinas had got this duck all prepared for roasting and put the dressing in, approximately what time was it?

A. It was almost four o'clock by that time.

Q. What time did you put the duck in the oven, you or Mr. Salinas?

A. It was just a little before four o'clock, I believe.

Q. Then what time did you have dinner that afternoon?

A. It was around six, or a little after, that evening.

Q. Now during the period between four o'clock and six o'clock that evening, where was Mr. Salinas? A. He was in the apartment there.

Q. What was he doing?

A. Well not much. We didn't do anything but wait for dinner to cook.

Q. Was any other company there during that two hour period? [500]

(Testimony of Clara Salinas.)

A. No. Mr. Amundsen was in there, I believe.

Q. I didn't get that last remark.

A. Mr. Amundsen did come back after he had his dinner date. I believe it was about that time that he came back, and they played crib for awhile again.

Q. That would be the second time that they played crib that day. Is that right? A. Yes.

Q. Was that while dinner was being prepared?

A. While it was cooking, yes.

Q. Then during that two hour period was Mr. Salinas in the apartment at all times?

A. Yes. As far as I know. I didn't see him leave the apartment.

Q. Then after you had—you say you ate about six o'clock, is that right? A. Yes.

Q. About what time did you finish your dinner?

A. Well, it was about seven, I believe, by the time we finished.

Q. And then after having your dinner, what did you do?

A. Oh, we cleaned up and sat around.

Q. By cleaning up, what do you mean?

A. Well, cleaned up the kitchen and did the dishes.

Q. Then you say you sat around. Did any company come after dinner?

A. Well, Mr. Amundsen was in and out of there all the time.

Q. Did he live in the hotel?

A. No, he didn't. [501]

(Testimony of Clara Salinas.)

Q. Then when was the last time that Mr. Amundsen left? A. I didn't get that.

Q. You say Mr. Amundsen was in and out a couple of times. When was the last time that he left? A. That he left?

Q. That he left, yes.

A. It was sometime around 8:00 or a little after, or something around there.

Q. Then after Mr. Amundsen left, what did you do? What did you and Mr. Salinas do?

A. We didn't do anything. We just sat around in the front and drank coffee.

Q. Did you have anything to eat after you had cleaned up?

A. We had some cake. We had some cake with our coffee.

Q. Then did anything unusual occur after you had finished dinner and had cleaned up the place, washed the dishes and had some cake and coffee again? A. No.

Q. Did you hear any commotion outside of your place?

A. Oh. You mean when they came to tell Steve about the fire?

Q. Yes. Just explain what happened.

A. Some girl came running in the building and hollared to Steve that his restaurant was on fire.

Q. What did Steve do?

A. Well, he went to get dressed. He got his boots and parka.

Q. By boots—what kind of boots were they?

(Testimony of Clara Salinas.)

A. His over-boots.

Q. How was Mr. Salinas dressed for dinner and after dinner. What type of clothing was he wearing?

A. Well, he had slacks on and a white shirt and a tie—the way he always dresses.

Q. Was he dressed up with good clothes, nice clothes? A. Yes.

Q. Like he is dressed up now? A. Yes.

Q. Did he change or attempt to change any of those clothes that you know of before he went to the fire? A. No.

Q. Just put on his over-boots and parka and left, is that right? A. Yes.

Q. How long was he gone at that time, Mrs. Salinas?

A. Oh, he was gone for quite awhile. He was gone quite awhile. I went to bed about a couple of hours after he left. I sat up awhile.

Q. You are positive then, Mrs. Salinas—are you positive that between approximately noon on the 25th day of December, 1957, up until approximately 11:00 o'clock of that evening, that Mr. Salinas was in your building, in the upstairs part of the Rotman building? A. Yes.

Q. Do you remember how the weather was that day, Mrs. Salinas, as to temperature?

A. It was very cold, a cold day, a very cold day.

Q. Do you, by any chance, remember anything as to how cold it did get that day?

A. It must have been close to forty (below), one of the coldest days we had.

(Testimony of Clara Salinas.)

Mr. Taylor: Can I have just a minute, your Honor?

The Court: Yes, very well.

Mr. Taylor: No further questions.

Cross Examination

Q. (By Mr. Hermann): Mrs. Salinas, you testified that you knew what restaurant equipment the Kotzebue Grill actually contained, is that true?

A. That's right.

Q. How many times had you been over to the Kotzebue Grill in the month preceding the fire?

A. Preceding the fire?

Q. Yes.

A. Oh, I don't—I can't say how many times I have been there. Quite a few times.

Q. Do you know whether the equipment was new or used?

A. Whether it was new or used?

Q. Whether it was new or used equipment.

A. Well, it was all used.

Q. Do you know how old it was?

A. Well, some of it was stuff that was there when Steve bought the place.

Q. Was it new or used at the time he bought it?

A. A lot of it was new, quite new. [504]

Q. Do you know how old, say, the ice cream freezer was? A. The ice cream freezer?

Q. Yes. A. Well——

Mr. Taylor: If your Honor please, I don't believe there was any testimony as to any ice cream freezer being in there. I think——

(Testimony of Clara Salinas.)

Mr. Hermann: This is cross examination.

The Court: There was some evidence previously to the effect that you asked about equipment generally. I think it is proper cross examination to ask about it particularly.

Q. (By Mr. Hermann): Do you know how old that equipment was?

A. It probably was about four years old, something like that.

Q. At the time he bought the Grill?

A. Yes.

Q. Do you know what kind of condition these various items of equipment were in? A. Yes.

Q. Were they all in good condition?

A. Yes.

Q. Were they as good as new?

A. Not as good as new, probably, but they were usable.

Q. Well, as to your value put on them, $15,000.00 or $16,000.00, how do you base that? Was that their value when new, or the cost to replace them, [505] or their value as used, or what was that?

A. I figured on what they were worth at the time.

Q. At the time of the five? A. Yes.

Q. Was that their own value or the cost to replace them? A. Their own value.

Q. Their own value. Now did you figure that out item by item? A. Yes.

Q. You have figured it out item by item?

A. Yes.

(Testimony of Clara Salinas.)

Q. Where would you get a value to figure it item by item? Where would you start?

A. How do you mean?

Q. Would you depreciate them or use the value of the comparatively new article? A. Yes.

Q. A comparatively new article? A. Yes.

Q. Your value would be really what it costs now to replace them? A. No, not necessarily.

Q. Yet you used the figures for a new item today, did you?

A. Yes. I compared with a new item today.

Q. Looked it up in the catalog, did you?

A. Yes, some of it.

Q. Then you figured in what it would cost to put the article in there [506] today, the value it has today, wasn't it?

A. No, not necessarily.

Q. Well, did you take the new value and reduce it any? A. Yes.

Q. How much?

A. About 20% or something like that.

Q. Do you know how many groceries might have been stored upstairs in the Kotzebue Grill?

A. Approximately about a thousand dollars' worth.

Q. Upstairs? How many downstairs?

A. Well, that's altogether.

Q. Altogether, upstairs and downstairs? About a thousand dollars?

A. Well, the meat was about a thousand dollars too. That was in the back.

(Testimony of Clara Salinas.)

Q. One thousand dollars then for the meat, and one thousand dollars for groceries? A. Yes.

Q. You say that Steve had between $6,500.00 and $7,000.00 worth of groceries at your place?

A. Yes.

Q. How do you know that he had that much, that value of groceries?

A. Well, I knew just about how much he ordered and how much he had taken out.

Q. When did that order come in?

A. On the boat. [507]

Q. What year was that? '56 or 57? A. '57.

Q. '57? A. Yes.

Q. What was the total amount in '57 that he received through you?

A. It was about $10,000.00, a little bit more, I think.

Q. What month did that boat come in?

A. That was the first boat that came in. That would be July, I believe.

Q. That's the customary month for the boat, isn't it? A. Yes.

Q. Now have you been previously interviewed by Marshal Oliver? A. Yes. Several times.

Q. And Mr. Adirim? A. Yes.

Q. Also Mr. Harkabus? A. Yes.

Q. Did you tell them that you had no knowledge of the Grill inventory? A. I don't remember.

Q. Could you have told them that?

A. I don't remember if I did.

Q. Now you stated a girl came and notified you

(Testimony of Clara Salinas.)

of the fire. Do you know the name of that girl?

A. It was Nannie Howarth.

Q. Was there any other girl that came later?

A. There was some other kids that came later on, but I don't just remember [508] what their names were.

Q. Was it very much later? A. No.

Q. How were you dressed at the time they came?

A. Oh, I was fully dressed yet.

Q. You weren't in your bathrobe when the second girls came? A. The second girls?

Q. Not the first one, but when the others came later.

A. I think there were a couple of boys came to get some CO-2 fire extinguishers, and I probably was in my bathrobe then.

Q. That was shortly after Steve left?

A. It was quite awhile afterward I guess.

Q. Well, hadn't you retired to your room while Mr. Amundsen and Steve were playing cribbage?

A. No, I wasn't in bed.

Q. Were you in your room?

A. I was in and out of my room and in the kitchen.

Q. Now which room were you and Steve in when the girl came to tell about the fire?

A. The front room.

Q. Were the lights on in there?

A. Oh yes.

Q. When you talked to the marshals on the investigation previously, did you tell them that Steve

(Testimony of Clara Salinas.)

could have been gone without your knowing it?

A. I don't remember; I might have. [509]

Q. Do you think he could have been gone without your knowing it? A. I don't think so.

Q. It's possible though?

A. No. Because I was up there all the time he was there. I didn't see him leave.

Q. Could he have gone out for ten or fifteen minutes at that time without your knowing it?

A. I don't know. I am sure he didn't.

Q. Was Steve in the custom of buying groceries from Rotman's for his restaurant before the fire?

A. Yes.

Q. Now these supplies he ordered through you, where were they kept?

A. They were stored in the basement. The warm storage was, the case stuff.

Q. The basement of the store? A. Yes.

Q. Now when those groceries were taken out to the Grill did he pay for them at the time?

A. Yes.

Q. Did he pay for them at the time he took them? A. Yes.

Q. What price would he pay for them, wholesale or retail?

A. We gave him a deduction of 10%.

Q. They were billed to you were they?

A. Billed to me. [510]

Q. Yes. From the wholesale house. A. Yes.

Q. They were on your books, were they?

A. Yes.

(Testimony of Clara Salinas.)

Q. As he would need them he would take them out and pay for them, is that correct?

A. That's right.

Q. Those were really your groceries?

A. Yes.

Q. That includes this $6,500.00 worth of groceries? A. Yes.

Q. Did you sell meat to him regularly?

A. Yes.

Q. Did he buy most of his meat from you or just part of it?

A. He bought most of it from me.

Q. When did Steve come back from the fire, about what time?

A. It was quite late; I was already in bed.

Q. Did he tell you anything about the fire when he got back? A. Yes.

Q. Did he tell you how it started?

A. No. I didn't question him.

Q. No further questions.

Redirect Examination

Q. (By Mr. Taylor): Mrs. Salinas, Mr. Hermann questioned you in regard to these groceries ordered. I would like to ask you how many boats a year do you have at Kotzebue [511] from the States? A. Only 1.

Q. Only 1? A. Yes.

Q. When you place your grocery orders to come on that ship—you say it got in about August—July or August 1957? A. Yes.

(Testimony of Clara Salinas.)

Q. Did you make up your order for your store?

A. That's right.

Q. And then how did you handle Mr. Salinas' order?

A. Well, I asked him just what he needed and he gave me an idea, so I just added that to my own grocery order.

Q. You added that to yours? A. Yes.

Q. Around $10,000.00? A. Yes.

Q. That's all, Mrs. Salinas.

(There were no further questions and the witness was excused from the stand.)

(At this time, 10:50 a.m., court recessed for approximately ten minutes, the jury being first duly admonished.)

After Recess

(At 11:00 a.m. court reconvened and the trial of this cause was resumed, all persons necessary being again [512] present. Both counsel stipulated as to the presence of the jury.)

JACK O. JONES

was then called as the next witness for the defense and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Crane): Will you state your name, please. A. Jack O. Jones.

Q. Where do you reside?

A. Kotzebue, for about pretty close to ten years.

(Testimony of Jack O. Jones.)

Q. What has been your usual occupation in Kotzebue the biggest part of the last ten years?

A. Well, I work for Mr. Ferguson.

Q. In what capacity?

A. Well, Clerk and Acting Manager.

Q. In other words, you run the Ferguson store at Kotzebue? A. That's right.

Q. Does the Ferguson store at Kotzebue handle a commodity known as outboard motors?

A. Yes.

Q. Do you remember during the last year or the last two years, just roughly, approximately how many outboard motors have you sold in that one store?

A. If I remember right I probably sold about a hundred, or a little more than a hundred.

Q. That's from the one store? [513]

A. Yes.

Q. Now do the other stores sell outboard motors?

A. Yes. Hansen's store.

Q. Does Bullock also sell them? A. Yes.

Q. Just as a rough estimate then, about how many outboard motors are there up and down the beach at Kotzebue there?

A. Probably around three hundred I think, or more.

Q. Around three hundred? A. Yes.

Q. What kind of fuel do these outboard motors burn? A. They use regular motor gas.

Q. Now is anything mixed with that motor gas?

A. Yes.

(Testimony of Jack O. Jones.)

Q. What is mixed with it?

A. It's mixed with zerolene No. 30 or No. 40.

Q. Just explain what you mean by zerolene? That's a lubricating oil is it? A. Yes.

Q. By the way, do you have an outboard motor also, of your own? A. Yes, that's right.

Q. What is the ratio of the mixture of gasoline and oil for outboard motors?

A. A pint to every gallon. In other words a quart to a six gallon tank.

Mr. Hermann: If your Honor please, I would like to have [514] the testimony stricken as immaterial. I thought for awhile they were going to relate it.

Mr. Crane: If your Honor please, we will definitely connect it up.

The Court: Very well. With that assurance the motion will be denied.

Q. (By Mr. Crane): Mr. Jones, does the amount of zerolene to the amount of gas depend on the size of your motor? A. No, not properly.

Q. All motors use the same mixture? Little motors as well as big motors?

A. A 30 motor will use the same mixture as a 10 horse motor.

Mr. Hermann: No questions.

The Court: That's all then, Mr. Jones.

(There were no further questions and the witness was excused from the stand.)

WILL M. GILLIS

is called as the next witness for the defense, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please? A. Will M. Gillis.

Q. Where do you reside, Mr. Gillis? [515]

A. Here in Nome.

Q. How long have you lived in Nome?

A. Nearly 14 years now.

Q. What is your business or profession or occupation? A. Carpenter.

Q. As a carpenter do you also engage in contracting? A. I do.

Q. How long have you been engaged in carpentering, Mr. Gillis?

A. Practically all my adult life.

Q. Have you ever made an appraisal or estimate as to the cost of building buildings, or the cost of buildings already built? A. I have.

Q. Then you feel that you are capable of making an inspection of a building and ascertaining from that inspection the cost of replacement or the cost, the original cost of the building?

A. Reasonably so, yes.

Q. Mr. Gillis, have you had occasion at the request of the Government to make an inspection and examination of a building at Kotzebue known as the Kotzebue Grill? A. I did.

Q. When did you make that inspection?

A. Oh, possibly two weeks ago; I couldn't say the exact date.

(Testimony of Will M. Gillis.)

Q. You don't remember the exact date?

A. No, I don't know for sure, possibly two weeks ago, maybe three.

Q. How long—— [516]

A. Say—I do remember the exact date. I was there on Easter Sunday.

Q. How long did you take in examining that building, Mr. Gillis?

A. Well, I went to Kotzebue on the Wien plane Saturday morning and came back from Kotzebue Monday morning on the Wien plane. I was through the building two or three times checking it over. I looked it over, measured it, and that was all I was there for, was to look at the building.

Q. Just how did you proceed to make an examination of that building, Mr. Gillis?

A. I don't believe I understood.

Q. What did you do with regard to examining that building to ascertain its cost?

A. I went through the building. I checked from the outside and went through the building, top and bottom, and looked it all over, and figured approximately what it would take to replace the building.

Q. Did you go into the attic? A. I did.

Q. Did you see what type of material, the dimensions, the rafters, were?

A. Approximately, yes.

Q. And the ceiling joists in the attic?

A. That's right.

Q. Did you see the ceiling joists of the second floor? A. Yes.

(Testimony of Will M. Gillis.)

Q. And the studding, the size of the studding?

A. That's right.

Q. And the foundation timbers? [517]

A. Approximately, yes. I couldn't get under the building. Where the building was sitting at that time I couldn't get under the building.

Q. Then, you say about three times, two or three times you were in that building looking it over?

A. Yes, I must have been in the building at least that number of times, and I checked the outside several more times.

Q. What?

A. I checked the outside of the building several more times, but I guess I was in the building three times, probably.

Q. Now from your examination of that building that you have described and from what you know of prices, have you an opinion as to the replacement cost of that structure? A. Yes.

Q. You do have?

Mr. Hermann: I object, your Honor. The actual value of the building wasn't at issue, and we are dealing with the insurance value.

The Court: We had testimony from Mr. Harkabus, it is true, on insurance value, or the replacement cost less depreciation. He also testified replacement cost depends on several factors, including the original cost. So the objection must be overruled.

Q. (By Mr. Taylor): Then you do have an opinion as to the approximate replacement cost?

(Testimony of Will M. Gillis.)

A. I do.

Q. Mr. Gillis, will you tell the Court and jury what you believe would [518] be the reasonable replacement cost of that building?

A. Taking into consideration freight and lighterage rates, and labor rates, and the location, it's my approximate estimate that it would be about $58,000.00.

Q. Mr. Gillis, when you were making an examination of this building to ascertain the value of it, the replacement value, did you have occasion to examine the attic? A. I did.

Q. And did you see, did you inspect the damage that had been caused by the fire?

A. I saw it, yes.

Q. From your examination or your seeing that particular damage, would you have an opinion as to the extent of that damage in dollars?

A. The damage to the building in dollars I wouldn't think would be over a thousand dollars or fifteen hundred dollars.

Q. And you, as a carpenter or builder, would be able to repair that damage for that sum?

A. I think so.

Q. Now Mr. Gillis——

The Court: At this point, Mr. Taylor, before you proceed to some other inquiry, pursuant to objection recently made, it would be necessary to show not only the replacement cost, but the depreciation deducted from that to arrive at the insurable value, which is an issue here. Do you propose to show

(Testimony of Will M. Gillis.)

depreciation? Mr. Taylor, do you propose to show that then? Otherwise it would [519] not be wholly material here unless there be deducted from the replacement cost the depreciation or use. That is the insurable value. Unless that is shown I must hold that this testimony is not material or competent.

Q. (By Mr. Taylor): Now Mr. Gillis, that $58,000.00 would be the replacement value. Do you have an opinion as to the value, that is, taking into consideration the depreciation of that building.

A. I wouldn't know that for sure because I don't know how old the building is.

Q. Now if the evidence shows the building is thirteen years old would you be able to state what the insurable value of that building would be?

A. That would be a hard thing for me to do. Does the depreciation of the value of a building go over a period of years or does it only go for ten years? I am asking.

The Court: Well depreciation, of course, depends, of course, in part as to the number of years and the age of the building. But you should be in a position to judge what rate of depreciation should be used for that type of building.

A. That would be hard for me to do, and I don't know the exact age of the building.

The Court: Assuming that the age is thirteen years, an assumption that counsel asked you. How much would you figure the depreciation on it over that period.

(Testimony of Will M. Gillis.)

A. Ordinarily you only allow a certain percentage of the cost as [520] depreciation per year.

The Court: I cannot testify. The depreciation should be shown by some means.

Q. (By Mr. Taylor): If you were to take 5% per annum as depreciation, would you be able to figure it?

A. If I knew the original cost of the building.

Q. Assuming that $58,000.00 being the original cost.

A. That could be figured from there.

Q. Using those figures what would you think would be the insurable value?

A. There again it would be hard for me to say. 5% of $58,000.00 deducted each year over that period, you would come up with a certain figure. I couldn't tell you off-hand. I am not a good enough mathematician to tell you that off-hand.

Q. Well, using that formula there would be a depreciation of $2,400.00 the first year, and in——

The Court: $2,400.00?

Mr. Taylor: I think so, your Honor.

The Court: I get $2,900.00. 5% of $58,000.00.

Mr. Taylor: Yes, $2,900.00, your Honor.

Q. (By Mr. Taylor): Then, assuming, Mr. Gillis, that 5% would be $2,900.00 per year, what do you believe the depreciation would be over 13 years?

A. Your depreciation would have to be worked down from that value. [521] The second year it wouldn't be as much as it would the original year, because you have already $2,900.00 deducted. It

(Testimony of Will M. Gillis.)

would be $58,000.00 minus $2,900.00 at 5%.

Q. Then the next step would be 5% of $58,000.00 less $2,900.00? A. I would think so.

Q. Say we took the full $2,900.00 or $2,400.00 over a period of 13 years. Do you know how much that would be?

A. Well, it would be thirteen times $2,900.00. I am getting confused now.

Q. I believe the first yearly depreciation would be $2,400.00.

The Court: 5% of $58,000.00 is $2,900.00 according to my arithmetic.

Mr. Hermann: I have $2,400.00 also.

The Court: Somebody needs to learn arithmetic. 5 x 8 is 40, and 5 x 5 is 25, plus 4 is 29. That's the only arithmetic I know.

Mr. Taylor: That's right.

Q. Well, isn't it a fact, Mr. Gillis, if we took the full $2,900.00 each year there would be a depreciation of $37,700.00?

A. I assume there would be.

Q. So the insurable value then would be $58,000.00 less $37,700.00? Is that right?

A. I believe so.

Q. Now would the fact that a going business in such a building, that would also affect the valuation, would it not? [522]

A. I don't believe I understand your question.

Q. A profitable business operated in a building such as that would be also a factor to be taken into consideration, and also the future life of the building? A. I suppose so, yes.

(Testimony of Will M. Gillis.)

Mr. Taylor: If your Honor please, I will have a witness to testify as to this actual depreciation and the value of the building later. But I would like to continue with Mr. Gillis on another matter.

The Court: Yes, very well.

Mr. Taylor: Would the Clerk please mark this for identification.

(A box containing sawdust is marked for identification as defendant's Exhibit No. 12.)

Q. (By Mr. Taylor): Mr. Gillis, I hand you defendant's identification No. 12, which is a box containing a substance. Would you state what that substance is?

A. It is a coarse type sawdust.

Q. Where did you get that sawdust, Mr. Gillis?

A. I received it from Wien Airlines.

Mr. Taylor: We would like to have this marked for identification, Mr. Clerk.

(A document is marked for identification as defendant's Exhibit No. 13.) [523]

Q. (By Mr. Taylor): I now hand you defendant's identification No. 13 and ask you to state, if you can, what that is.

A. Well, this is the waybill for the box of material that I received from Wien Airlines, as I understand, when it was sent down from Kotzebue.

Q. Where did you get this box?

A. I picked it up at Wien Airlines office.

Q. And this is the waybill for that?

A. That's right.

Q. Where did you get this waybill?

(Testimony of Will M. Gillis.)

A. At Wien Airlines.

Q. At whose request did you pick that exhibit up?

A. Mr. McNees had told me. Mr. Crane, I think, had told him to contact me when it came in.

Mr. Taylor: If your Honor please, we would like to offer this waybill and sawdust, this coarse sawdust, in evidence.

The Court: The source will be connected up?

Mr. Taylor: There is a witness on the plane coming down this morning. The plane of this witness is expected momentarily.

Mr. Crane: The plane is expected anytime.

The Court: With the assurance that it will be connected up, it may be received. Both the box and the waybill.

Mr. Hermann: Objected to, subject to being connected up.

(Defendant's identifications 12 and 13 are received in evidence.) [524]

Q. (By Mr. Taylor): Mr. Gillis, at the time you received that box, was there any more sawdust in it than at the present time?

A. Yes. The box was full, practically full.

Q. Then pursuant to request by defense counsel did you make any tests regarding the ignition of that sawdust or parts of it? A. Sir?

Q. Did you make any tests regarding the ignition of that sawdust? A. I did.

Q. How many tests did you make, Mr. Gillis?

A. Well, we made five at least.

(Testimony of Will M. Gillis.)

Q. Would you state just what those tests were, what was done preceding the tests, and how the test was conducted and the result?

A. Well, the first test we made we took a pile of sawdust and turned a flame from a presto-lite torch into it. The second test we took a pile of sawdust and connected up a soldering iron and put it into the sawdust.

Mr. Taylor: I don't believe this was marked for identification. We would like to have the Clerk mark this soldering iron for identification.

(A soldering iron is then marked for identification as defendant's Exhibit No. 14.)

Q. (By Mr. Taylor): I hand you plaintiff's (defendant's) identification No. 14 and ask you if that is the soldering iron which you used in test No. 2? [525] A. It is.

Q. Then how did you make that test, Mr. Gillis?

A. We took a pile of sawdust and connected the iron up, placed it in the sawdust, covered it over, and let it go to see what would happen.

Q. Did you turn the juice on, the electricity on?

A. Yes sir.

Q. Now you used the word "we." Was anybody else present at the time those tests were made?

A. Mr. Norvin Lewis was present when I made them.

Q. Now how long was test No. 2 continued?

A. The test with the iron?

Q. Yes.

A. I think that was approximately 55 minutes, although he kept the exact time; I didn't.

(Testimony of Will M. Gillis.)

Q. You think it was approximately 55 minutes?

A. Yes.

Q. What was the result of that test?

A. You got a charring action started in the sawdust but no blaze.

Q. What was the atmospheric condition at the place that you conducted that test?

A. Well, the doors were open, plenty of air and pretty breezy, no shortage of air or circulation as far as that goes. Some were conducted outdoors; some indoors.

Q. How was test No. 2 conducted?

A. It was conducted indoors. [526]

Q. You say all you got was a charring action?

A. That's right. That's all we got from it at all.

Q. Test No. 3, what was test No. 3?

A. In test No. 3 we took a pile of it and poured a mixture of gas and oil over it and touched a match to it.

Q. What was the result of that test?

A. After all the fumes of gas and oil burned out the flame went out. The charring action was still there but the flame went out.

Q. Was any of the sawdust consumed?

A. Some of it was; some of it wasn't. There was considerable of the original sawdust that was put there that was untouched. Quite a little bit of it. It was mainly burned on top. Down below an inch and a half deep it wasn't charred at all.

Q. And then test No. 4. How was that conducted, Mr. Gillis?

(Testimony of Will M. Gillis.)

A. In test No. 4 we took a pile of sawdust and poured a can of lighter fluid over it.

Q. Lighter fluid I believe is highly volatile, is it not? A. I think so, yes.

Q. Under what atmospheric conditions?

A. That was conducted outdoors.

Q. That was conducted outdoors. What burning action did you get from that?

A. Well, again we got fumes that burned off. As soon as the fumes of the lighter fluid had burned, the blaze goes out and the charring action stays there. It burns like a punk, but again it only burns on the top. It only [527] burned down an inch or an inch and a half, but it only burned on the top.

Q. In none of these tests so far was there any continuous burning of the sawdust after you took the heat from it?

A. No. The sawdust would go ahead and burn like punk, but there was no blaze.

Q. It would smoulder, is that it?

A. It would smoulder slowly.

Q. Then test No. 5, by what method was that test conducted?

A. In No. 5 we took blazo and poured the blazo directly over it and touched a match to it.

Q. What happened?

A. We got practically the same action that we got with the lighter fluid. As soon as the fumes burned off the blaze goes out and you have a charring on top, but it doesn't go very deep.

(Testimony of Will M. Gillis.)

Q. Now what tests did you make, if any, as to odors remaining after you had the blazo, the lighter fluid and the mixture of oil and gas?

A. The blazo and lighter fluid we couldn't detect any odor after the blaze had gone out. The mixture of oil and gas after the fumes had gone out you could detect the odor of the oil there.

Q. Was that the only test in which you could detect the odor of oil?

A. That was the only thing there on what we tried. We couldn't detect the gas or blazo or lighter fluid.

Q. I believe you testified that the first—was it the first test you tried for 55 minutes?

A. No, the second. We tried with the iron for approximately 55 minutes. [528]

Q. And then in the third test, was the iron used?

A. No. The third test was with the gas and oil mixture and that only continued as long as there was any flames from the oil and gas mixture, as long as there was oil and gas fumes there apparently. As soon as that was burned off the flames died off.

Q. Do you remember how long that took, Mr. Gillis?

A. Oh, I couldn't say off-hand. Mr. Lewis, as I said, kept the time on that. I didn't pay too much attention to the exact time it took to burn off. It took the oil and gas longer to burn off than either the lighter fluid or blazo, and it burned with more of a smoke to it. It didn't burn as clean.

(Testimony of Will M. Gillis.)

Q. Then was the lighter fluid and blazo just straight, is that right? A. That's right.

Q. Do you remember how long each one of those tests took?

A. No, I couldn't say exactly. It doesn't take very long to burn off gas though or blazo, either one. Maybe they burnt for 20 minutes, maybe a half hour. Again, if you would ask Mr. Lewis—he was keeping the time. I was interested in the action, what happened, and the degree the fumes had burnt off, so I didn't keep the time exactly.

Q. Now, Mr. Gillis, did you have an opportunity to inspect that attic in the vicinity of where the fire took place? A. I did.

Q. Would you state whether or not you noticed in the attic a bulkhead, the attic bulkheaded off?

A. I did.

Q. In your opinion, Mr. Gillis, would a fire, if started by human actions [529] do you think that would be the most logical place in which to start a fire to burn a building down.

A. Well, it wouldn't be my opinion that it would.

Mr. Hermann: If your Honor please, I object. This would not be the type of opinion Mr. Gillis is qualified to make. In fact it is in the realm of conjecture. Surely he is not qualified in the realm of fire inspection or causes of fires, and therefore it would be purely conjecture.

Mr. Taylor: If your Honor please, I was thinking this way: that if you say this was set by human hands——

(Testimony of Will M. Gillis.)

The Court: The problem is as to whether or not the witness may give an opinion on a matter on which he is not qualified as an expert. An opinion can be given only by one so qualified in that particular field.

Q. (By Mr. Taylor): Mr. Gillis, how big an area was it from the bulkhead to the end of the building? A. Oh, probably 16 feet.

Q. Was that a solid bulkhead?

A. Yes. Apparently it had been built in there pretty solid.

Q. Then the area to which the fire would have immediate access would be about 16 feet in width?

A. I would think so, yes. I don't remember the exact figure.

Q. About what length?

A. About approximately 20 or 22 feet, in that direction. [530]

Q. From your inspection, what was the area of the burning?

A. You mean in that one location?

Q. Yes.

A. It was charred and smoked pretty well over most of the location.

Q. Were some of the rafters burned through?

A. They were charred.

Q. Now, Mr. Gillis, I hand you plaintiff's Exhibit G-7 and ask you to state if that would correctly depict that attic as you saw it?

A. I would think so. Pretty much, yes.

Q. I will hand you Exhibit G-4 and ask you to

(Testimony of Will M. Gillis.)
state whether or not that correctly depicts it?

A. Yes, I would imagine it would.

Q. Then I will also hand you G-3, plaintiff's Exhibit G-3, and ask you to state if that correctly depicts the condition of the attic after the fire?

A. I would think it did pretty much.

Q. Now calling your attention to G-7, would you point out to the jury—just hold this up like this, Mr. Gillis—and state what this purports to show.

A. I think that shows the sawdust there, doesn't it.

Q. Burned or unburned?

A. To me it would be unburned.

Q. Now Mr. Gillis, from your observation of the damage done in that attic and your knowledge of burning, the common knowledge gained through years of experience, I want you to examine that and state whether or not, in your opinion, that piece of paper could have escaped being burnt if it had been laying on the top of the sawdust in the attic at the time of the fire? [531]

Mr. Hermann: Objection. Again he is asking for an opinion which he is not especially qualified for.

The Court: You assume in your question, counsel, years of experience in burning, but you have no such testimony of Mr. Gillis. Again matters of common knowledge, common experience are questions of inference which may be drawn by the jury, but a witness may not testify to an opinion on a matter unless he is particularly qualified. Objection sustained.

(Testimony of Will M. Gillis.)

Mr. Taylor: If your Honor please, at this time I would offer this in evidence.

The Court: That has been admitted.

Mr. Hermann: Could I see that, Mr. Taylor.

(Mr. Hermann examines the soldering iron.)

The Court: No, I do not believe this soldering iron was admitted. It was merely marked.

Mr. Crane: The same in number, same make and manufacturer.

The Court: No objection?

Mr. Hermann: No objection.

The Court: Exhibit 14 then may be received.

(Defendant's Exhibit No. 14 is received in evidence.)

Q. (By Mr. Taylor): Now Mr. Gillis, I hand you plaintiff's Exhibit I and plaintiff's Exhibit E and ask you to state if those two exhibits if put together would [532] constitute a soldering iron?

A. I am not qualified to answer that, sir. They look very much like pieces of a soldering iron to me, but I am not an electrician and I couldn't answer you on that truthfully.

Q. And then this soldering iron that has been introduced in evidence here, do you know whether or not this barrel and this point is all the metal work there is in that?

A. I can't truthfully answer that either, because I haven't had one of them apart.

Q. Now Mr. Gillis, coming back to that bulkhead that you stated was about a short distance from where the fire started, would that bulkhead

(Testimony of Will M. Gillis.)
have a tendency of eliminating or cutting off any draft that would be going through the fire?

A. I would think it would have a tendency to.

Mr. Taylor: You may take the witness.

Cross Examination

Q. (By Mr. Hermann): Mr. Gillis, what state of repair did the building appear to be in when you examined it? Was it a good state of repair, poor state of repair or how would you express that?

A. For the age of the building I would say it was in a fair state of repair.

Q. Was it level? Did you test that?

A. That I couldn't tell. I didn't take an instrument to put on it or anything.

Q. Did you examine the wiring? [533]

A. Not particularly, no.

Q. Did you examine the roof?

A. I looked at the roof, yes.

Q. What kind of condition was it in?

A. Oh, I would say normal for the age of the building.

Q. You weren't able to get underneath the building?

A. I just looked at it from the outside.

Q. Well, then, when you made your estimate of value, did you assume whether or not it would need wiring? Did you take that into consideration?

A. Yes, sure.

Q. Did you, when you said $1,000.00 to $1,500.00

(Testimony of Will M. Gillis.)
for the damage by fire, did that include re-wiring of the building?

A. That would include the damage—the re-wiring that was burned. I don't know how much. A lot of wire you couldn't see. It wasn't exposed.

Q. It would be just from an assumption then?

A. I judged from what I could see that that would take care of the wiring that was damaged. That may be $1,500.00 or again, it may be a little more or less. Whether the other wiring is in good enough shape now that you could safely hook on to it or use it, or whether the whole building would have to be re-wired——

Q. Assuming the whole building would have to be re-wired, would you be able to give a figure?

A. I would have to go back to an electrician or get him to give me an estimate.

Q. When you appraised the building you didn't consider any factor of re-wiring? [534]

A. I didn't appraise the building; I figured the replacement cost of the building.

Q. The replacement?

A. The replacement cost of the building. In other words, if I had to go up there and build a similar type of building, I figured it would cost approximately so much, which would include the wiring and so on and so forth.

Q. Well, then, other than the depreciation figure we have taken here, by using the figure of 5%, you have deducted nothing else from that replacement cost?

(Testimony of Will M. Gillis.)

A. No. No. In fact I didn't even deduct that because I didn't know the age of the building and didn't know the original cost of the building, and I am not positive whether 5% is an allowable cost to depreciate it.

Q. Did you make any estimate as to the present market value of the building?

A. No. I don't know about that at all. I don't know about the land values in Kotzebue. I wouldn't know about that at all.

Q. In other words, it would depend on factors that you are not familiar with?

A. What's that again?

Q. That would depend on things you are not familiar with?

A. That's right. I don't know property values in Kotzebue.

Q. Now these tests you have made, particularly the one where gas was used—you state they were all made in the open air?

A. Any burning was done in the open air with the exception of the first test. That was made with a presto-lite torch and that was done just inside the door. [535]

Q. After the first one?

A. Yes. That is, after the first smoking action we got outdoors.

Q. I see. Did you extinguish those blazes outdoors?

A. They went out by themselves.

Q. They would have full opportunity to burn up

(Testimony of Will M. Gillis.)

all the gasoline? A. That's right.

Q. They were not extinguished? A. No.

Q. You poured no water over them or anything?

A. No.

Q. Were any of them put in a confined space at all, such as a stove or oil drum or anything like that?

A. Two of the tests were conducted in a small tin can. I mean a low tin can; because I didn't want anything with gas in it to spread. The two with the iron were conducted in a pile.

Q. In a pile?

A. Yes—the one test with a soldering iron and the one with a presto-lite torch were conducted in a pile, but the gas and oil and blazo tests we took outdoors and put in a low can, poured the can full.

Q. Oh, the can was filled?

A. It was filled full of sawdust, yes.

Q. Would you describe that can.

A. A pound coffee can about so big (indicating).

Q. Were there any holes in it?

A. Well, the top was off. [536]

Q. No draft could come under that?

A. No, I don't think so.

Q. Now would you describe how this sawdust was piled in the tests that were not made in the can.

A. Those not in a can were just heaped up in a mound.

Q. Not on the outside?

A. What was done was done in front of the door, but it was done inside the building, but it

(Testimony of Will M. Gillis.)
made so much smoke in there we took the rest of them outside.

Q. Did you observe any glowing of the sawdust?

A. Yes, you could see a charring action there a good deal like punk, but there was no flame.

Q. You have no way of knowing what the effect of this would be if it were in a confined space?

A. I don't believe I understand.

Q. If the fire were covered, for instance, you have no method of knowing what the effect would be then? A. No.

Q. If it had a cover on it as in a stove or drum or something?

A. Well if it was in a drum with a cover on it I don't know whether you would get flames or what you would get there. You certainly wouldn't get any air to it. It would die out.

Q. Mr. Gillis, would you tell us whether or not —I am holding up defendant's Exhibit 14—this blackened portion on the handle, whether that was on the handle when you started your experiment or not? [537]

A. No. I didn't see anything like that on the handle at the experiment. I expect that probably comes from shoving it back into it, fairly deep into the charred sawdust.

Q. Did the fire do that?

A. Not that I remember, no. It might have been. I didn't take particular notice of that. I rather assume that we did it, but I couldn't swear to that.

Q. Now did you ever conduct any tests using

(Testimony of Will M. Gillis.)

only the element of the iron? A. No.

Q. You always used the whole iron?

A. That's right.

Q. Did you ever conduct any tests using any material other than sawdust?

A. Other materials?

Q. Yes. Such as paper and things like that.

A. No.

Q. You always just used sawdust? A. Yes.

Q. Never used paper or cardboard or rags or any other material? A. No.

Q. How long did the fire burn when it had been mixed with the gas and oil?

A. I can't tell you the exact minute on that.

Q. A guess is good enough.

A. Mr. Lewis will probably have it, but probably thirty minutes, I guess; it took maybe a little longer than the other two.

Q. Was the blazo about 20 minutes? [538]

A. Again, Mr. Lewis kept the exact time on them.

Q. How high a pile of sawdust was used with the blazo alone?

A. Probably four inches high.

Q. How far did the flames leap up?

A. Not very high. Maybe when we first lit it a little bit higher than after.

Q. Did they go with a poof?

A. Naturally. Any gas does when you put a match to it.

Q. There was some flaring up at first?

(Testimony of Will M. Gillis.)

A. As I say, it probably flared a little bit higher when it was first lit, when the first fumes went off.

Q. And it would go down when the gas was consumed? A. Yes it did; it went out.

Q. About how large an amount of that mass of sawdust was charred?

A. Very little. Right on top of the sawdust. Maybe it was charred down an inch.

Q. An inch over the surface?

A. Yes. The pile down below wasn't charred deep.

Q. By charred do you mean that it was burned and black like charcoal?

A. More or less, yes. It burned a good deal like punk, a piece of punk.

Q. Smouldering?

A. You wouldn't get a flame back out of it. How long the smouldering action would go on I don't know. It might smoulder the whole pile away or it might go out.

Q. While it was smouldering did it discharge much heat?

A. Some, yes. Naturally. [539]

Q. How long did the charring last in the case of the test conducted with sawdust and gasoline?

A. Oh, I couldn't say exactly. After the flame had gone out it probably would have charred for quite awhile very slowly. It probably would have charred for a long time but very slowly.

Q. It would char for a much greater length of time than blaze?

A. Than blaze? If you could keep the blaze go-

(Testimony of Will M. Gillis.)
ing it would burn up in a very short time, but it would char a long time.

Q. Would it char for a long time after the blazing went out?

A. Yes. It would char for a long time. It would depend on the air conditions and so forth. I don't know just how long.

Mr. Hermann: No further questions.

The Court: Do you have any further questions, Mr. Taylor?

Mr. Taylor: I have some further questions but I would rather take a recess at the present time, your Honor.

The Court: Very well. We will take the usual noon recess.

(Thereupon the jury was duly admonished and court recessed at 12:00, noon, until 2:00 p.m.)

After Recess

(At 2:00 p.m., all persons necessary being again present, court reconvened and the trial of this cause was resumed. Both counsel stipulated to the presence of the jury and Will M. Gillis resumed the stand for redirect examination.)

Redirect Examination

Q. (By Mr. Taylor): Mr. Gillis, I believe I overlooked asking you one question. And that is, what proportions of oil and gas did you use in making, I believe, test No. 3, where you had the oil and gas mixture?

(Testimony of Will M. Gillis.)

A. We used a pint to the gallon.

Q. Now I believe in response to a question propounded to you on cross examination by Mr. Hermann as to where and under what conditions you made these tests, could you state whether the combustion would be better in the open air or in a confined space?

A. I think it would be better in open air, of course.

Q. Is that by reason of more oxygen?

A. That's right.

Q. I believe that's all, Mr. Gillis.

Recross Examination

Q. (By Mr. Hermann): Mr. Gillis, in regard to the test where you used gasoline and sawdust, what did you ignite that with?

A. With a match.

Q. You didn't at any time use a soldering iron to ignite the gasoline and sawdust?

A. Not the gasoline and sawdust, not with a soldering iron.

Q. Why?

A. I think it would be a little bit dangerous. I think you would be more apt to get an explosion. I wouldn't want to try it myself.

Q. In none of those tests did you use a combination of sawdust, gasoline and a soldering iron?

A. No. [541]

Q. Was there any particular reason you used a pint to a gallon?

(Testimony of Will M. Gillis.)

A. It was a fuel we already had mixed for a chain saw. That is the proportion we used in a chain saw.

Q. You just used that, then? A. Yes.

(There were no further questions and the witness was excused from the stand.)

NORVIN LEWIS

is called as the next witness for the defense and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you state your name please, for the record.

A. Norvin W. Lewis.

Q. Where do you reside, Mr. Lewis?

A. On Front Street here in Nome.

Q. What is your occupation?

A. At the present time I am bookkeeper for Gillis Construction Co.

Q. Have you, in the past, held official positions in the town of Nome? A. Yes, sir.

Q. What has that been?

A. I was for a number of years cashier in the Clerk's office, and also Clerk of the District Court for a number of years.

Q. How long have you been working for Mr. Gillis as a bookkeeper?

A. Well, it's about 14 months now. [542]

Q. Now Mr. Lewis, have you within the past few days been present while Mr. Gillis was making some tests in regard to the ignition of sawdust?

(Testimony of Norvin Lewis.)

A. Yes sir.

Q. Under various conditions? A. Yes sir.

Q. Will you just state what tests, to your knowledge, were made in your presence.

A. Well, there were five tests made. The first test was a heap of sawdust about four inches high in which a live flame was played or driven right on top.

Q. What was that live flame from?

A. From a presto-lite torch. The flame was from presto-lite gas. That flame played on there approximately five minutes, a hot flame. The second test we made, or rather the second test that Mr. Gillis made, was about the same amount of sawdust, taking an electric soldering iron and placing it about two inches under the top, and turning on the electricity. That continued for approximately 55 minutes.

Q. Then the third.

A. The third test was made—we made the first two indoors. The next three we made outdoors. The next test was made by placing a mound of sawdust on a piece of iron outdoors, pouring on it gasoline that had lubricating oil in it, such as we used in a chain saw, and that was ignited. That burned for quite awhile. There was no flame from the sawdust at all in that one. I would say that it continued about forty minutes.

Q. The next test? [543]

A. The next one was about the same amount of sawdust with pure white gas. That one burned for

(Testimony of Norvin Lewis.)

35 or 40 minutes and did not ignite. The fifth one was made with about the same amount of sawdust with blazo-octane gas. That one burned somewhere in the neighborhood of 40 minutes without igniting the sawdust.

Q. Now on the first test—I don't know whether I asked you this question or not—that was done with a blow torch, is that right, a torch?

A. Yes. It was.

Q. Would you state what happened to the sawdust upon which you had placed the direct flame?

A. Well, it just seemed to kind of turn black, but it wouldn't ignite.

Q. Then where Mr. Gillis had the soldering iron in the sawdust, what was the result of that? What happened to the sawdust?

A. The sawdust turned black from the iron, up to the top. I guess it was buried about two inches, and when I—or rather when he took the iron out there was a place four or five inches long where the iron had been laying, and the sawdust was all black up to the top. On each side there was sawdust not harmed at all.

Q. Then what was the result as to the sawdust in your third test, in which you ignited the oil and gas?

A. Well that burned, the oil and gas burned for quite awhile and just turned the sawdust black. Pretty near all of it turned black, because there was quite an amount of lubricating oil in there that took longer to burn out than just gas.

(Testimony of Norvin Lewis.)

Q. Then as to No. 4, where you used the lighter fluid, how long did that burn? [544]

A. That No. 4 test lasted approximately thirty minutes and when it finally went out, it was just the top layer of the sawdust showed—probably about three-quarters of an inch down it had turned black. The rest had the natural color in it.

Q. Was that a char or ash?

A. It was a char; it wasn't an ash.

Q. What was the result as to the sawdust when you used the straight blazo?

A. Just about the same as the No. 4. It burned the gas off and only charred down just a little bit.

Q. What would you say as to the time it burned with the blazo?

A. Well, I didn't take the time on it, but I think it would probably be around thirty minutes. He used quite a little blazo on it.

Q. Then as to the lighter fluid, how long did that pile of sawdust burn when you used just the lighter fluid?

A. Approximately the same time.

Q. What would you say as to the time the oil and gas mixture burned?

A. I would say it burned 40 to 45 minutes.

Q. But none of them would ignite the sawdust in flames?

A. No sir, there was no ignition of the sawdust at all.

Q. Now I will hand you defendant's Exhibit No. 14 and ask you to look at that and state, if

(Testimony of Norvin Lewis.)

you can, whether or not that is the blow torch used by Mr. Gillis—the soldering iron, I mean?

A. It looks like it. I know the one we had up there had a blue handle and I noticed it was extra long, worn just part way. This was extra long.

Q. Now, Mr. Lewis, in addition to the testing of the various piles of sawdust to ascertain whether or not they would ignite under various conditions, of which one was using a blow torch, another one was putting a soldering iron and another with oil and gas, did you make any tests as to the remaining odor or smell in that sawdust after the tests had been run on it?

A. There was only one and that was where the lubricating oil had been used with the gas. There was a smell of lubricating oil afterwards.

Q. Did you apply the test of smell on each one of those piles of sawdust that you had made, the sawdust only?

A. Where the oil was used or where the gas was used?

Q. Calling your attention to where the blazo was used, was there any odor or smell to the sawdust after using the blazo?

A. No, there was not, that I know of.

Cross Examination

Q. (By Mr. Hermann): Mr. Lewis, in relation to the first test, that's where you used a soldering iron, was it not?

(Testimony of Norvin Lewis.)

A. No. The first test was the live flame. The second was the soldering iron.

Q. Well, did the sawdust glow?

A. What do you mean?

Q. Did it turn red and glow? A. Both.

Q. Did the soldering iron glow?

A. It turned red. It was red when we pulled it out after 45 or 50 minutes. [546]

Q. Do you know whether or not it burned its handle? A. I don't know.

Q. Did the sawdust itself glow?

A. No, not that I remember.

Q. Did it smoke?

A. Yes. There was a little smoke came from it.

Q. Now in these other tests, in the ones performed outside, did the sawdust continue to smoke after the gas had burned off?

A. Yes, it did for awhile.

Q. And while the gas was burning was there a flame? A. Yes.

Q. About how high a flame?

A. Well, I wouldn't say, on account of the air, the draft. It would be up and down. Sometimes it would be just barely covering the top. Sometimes it would go up two or three inches.

Q. When would it go up the highest, when there was more wind or less wind?

A. Well, when there was kind of a draft it would kind of pick it up.

Q. It was a noticeable flame though, was it?

A. Yes.

(Testimony of Norvin Lewis.)

Q. Did you at any time use paper in these tests? A. No.

Q. No paper? A. No.

Q. Were there any other tests made at that time? [547]

A. No other tests that I know of.

Q. Those were the only ones?

A. These were the only ones.

Q. Now those tests in which the blazo and lighter fluid were used, was it spread in the open or put in a container?

A. It was in a container.

Q. Was there any draft through the container?

A. Holes in the container?

Q. Yes. In any way? A. No.

Q. When you say this sawdust charred, do you mean that it turned to charcoal?

A. I wouldn't say that. I just know that it charred and turned black.

Q. Did you try to crumble it or anything?

A. I did not.

Q. But it did smoke, did it? A. Yes.

Q. Would it smoke after the gas part burned off? A. Yes.

Q. How long did it continue to smoke after the gas burned off?

A. I don't know; I didn't pay much attention after the gas burned out. I know it was smoking afterward. How long it continued, I don't know.

Q. Was the sawdust you used saved? Did you

(Testimony of Norvin Lewis.)

save any of that? I mean the stuff that was actually used for the tests? A. No. [548]

Redirect Examination

Q. (By Mr. Taylor): I would like to ask just one more question, Your Honor. Perhaps it would be helpful to the jury. Mr. Lewis, I hand you plaintiff's Exhibit K and ask you to pour a little of that out on that paper and then state whether or not that resembles the sawdust after you had made your tests on it with Mr. Gillis?

A. This appears very damp with something. In the tests we made there was nothing like that at all, although it does have a resemblance to the sawdust, but not in the same condition.

Q. But yours was dry?

A. Yes. Otherwise I believe the appearance was the same.

Q. I believe that's all, Mr. Lewis.

(There were no further questions and the witness was excused from the stand.)

GEORGE LAMBERT

was then called and sworn as the next witness for the defense and thereafter testified as follows:

Direct Examination

Q. (By Mr. Taylor): What is your name, please? A. George Lambert.

Q. Where do you reside, Mr. Lambert?

A. Kotzebue.

(Testimony of George Lambert.)

Q. How long have you resided there?

A. Since '53. [549]

Q. What is your occupation?

A. Water delivery.

Q. Did you, at the request of Mr. Crane, this past week go to the Kotzebue Grill?

A. Yes, I did.

Q. What did you do at the Kotzebue Grill?

A. I went up in the attic and got some sawdust.

Q. I will hand you plaintiff's Exhibit G-7 and ask you to state if you recognize that?

A. Yes.

Q. Can you see on that photograph the place that you got the sawdust from?

A. Yes. Right over this way (indicating).

Q. Would you just hold that up and point it out to the jury, approximately.

(The witness does so.)

A. Approximately right here (indicating), down close to the eaves.

Q. Then after you got the sawdust, what did you do with it?

A. I put it in this box and took it over to the house and put it in a shopping bag and wrapped it up.

Q. I call your attention to this box, which has been marked so, with defendant's Exhibit number 12, and you say that's the box that you took to the plane.

(Testimony of George Lambert.)

A. Yes. I took the jam out of it and set the jam on some other cases and used this box.

Q. How much sawdust did you put in it at the time? [550] A. It was almost full.

Q. And after you got that box full of sawdust, what did you do with it?

A. I took it home, wrapped it up, put it in a shopping bag and tied it up and labeled it to Fred, and then my wife took it down to Wien.

Cross Examination

Q. (By Mr. Hermann): Mr. Lambert, when was it that you sent that down to Nome, what day?

A. I believe it was Friday when she took it down, either Thursday or Friday that she took it down to the Wien office.

Q. The shipping bill says the 24th; does that seem right? A. Yes.

Q. What day did you actually get that out of the attic?

A. The same day. I took it right over to the house the same day.

Q. You testified that it was taken right close to the eaves?

A. Not right under the eaves, but right close, because it was dry there.

Q. Was the rest of the attic dry?

A. Right over the hole it is wet, right around the hole there. You couldn't take any sawdust from around the hole.

Q. You didn't take any from around the hole?

A. No.

(Testimony of George Lambert.)

Q. Was that hole where the burning was the heaviest?

A. Right under where the roof was burned out.

Q. You didn't take any sawdust from there?

A. No.

Q. Did you take it from the surface or did you dig it out?

A. Right off the surface. [551]

Q. Did you take any from under the surface?

A. I don't know—maybe down a couple or three inches, a couple of inches or so. I scooped it up.

Q. How was the weather at Kotzebue the last month or so?

A. Fair. A little rain the last few days.

Q. Has it been above freezing the last month?

A. Mostly, yes.

(There were no further questions and the witness was excused from the stand.)

MYRTLE LAMBERT

called and sworn as the next witness for the defense, and thereafter testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please. A. Myrtle Lambert.

Q. Where do you reside? A. Kotzebue.

Q. The gentleman that was just now on the witness stand, is that your husband?

A. Yes.

Q. Mrs. Lambert, calling your attention to some

(Testimony of Myrtle Lambert.)

time—calling your attention first to this exhibit, defendant's Exhibit No. 12, have you seen that box before? A. Yes.

Q. Where did you first see it? [552]

A. At the house when he brought it home.

Q. What was in it at that time?

A. Sawdust.

Q. After your husband brought it home, what was done with it?

A. He wrapped it up in a shopping bag, tied it up.

Q. Did he put an address on it? A. Yes.

Q. Who was it addressed to?

A. Fred Crane.

Q. Then what became of the box?

A. I took it down to Wien and sent it off.

Q. When you took that down to Wien, calling your attention to defendant's Exhibit 13, was that given to you by Wien? A. Yes.

Q. And the proper charges were prepaid on that were they, Myrtle? A. Yes.

(There were no further questions and the witness was excused from the stand.)

RONALD COONS

was then called and sworn as the next witness for the defense and thereafter testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please. A. Ronald Coons.

Q. Where do you reside, Mr. Coons? [553]

(Testimony of Ronald Coons.)

A. Steadman Street.

Q. What is your occupation?

A. Well, I do a little of everything, income tax work, carpentry, painting.

Q. Are you trained in electronics also?

A. Yes sir.

Q. Meteorological work?

A. Meteorological work.

Q. You say you do and have done income tax work? A. That's right.

Q. Do you know what the approved depreciation is, approved by the Internal Revenue Office, on frame buildings? A. Usually 5%.

Q. Now Mr. Coons, assuming that a building's replacement value would be $58,000.00, but it was 13 years old, and you took that rate of depreciation for a period of 13 years, what would be the depreciated value?

A. It would be $29,774.00.

Q. Then in income tax work how are repairs figured in that?

A. Well, that's with the depreciation.

Q. What?

A. With the depreciation.

Q. That's figuring in the depreciation?

A. Yes, in an instance like this.

Q. Could you give an example for one year, say, just a figure as to a certain amount of repairs? How much depreciation?

A. Ordinarily you would take the 5%. [554]

(Testimony of Ronald Coons.)

Q. Then if there was some repairs any year, you took the 5%?

A. I think they would *ex*cept it if it showed a great increase in value to the property.

Q. That would increase the value, is that correct?

A. You would have to show that.

Q. That would be a permanent improvement?

A. Yes. Not a repair.

Q. Just taking the depreciation then on that valuation? A. $29,774.00.

Cross Examination

Q. (By Mr. Hermann): Mr. Coons, would that be the way you would depreciate a new building?

A. Yes, ordinarily. You generally start with the cost.

Q. All right. Suppose I bought an old building? A. The actual value.

Q. The actual value?

A. It wouldn't be the replacement cost or anything else.

Q. Just an accepted rule that for 20 years for something of that nature—well, if I bought a used building and paid a hypothetical figure of $10,000.00, say, I would start depreciating it at 5%, is that right? A. Yes, yes.

Q. Well, it wouldn't be at the replacement cost for tax purposes, would it? A. No.

(There were no further questions and the witness was excused from the stand.) [555]

ARCHIE ADIRIM

was then recalled as the next witness for the defense and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Crane): You have already been sworn. I believe you stated that you are a deputy marshal stationed at Kotzebue?

A. That's right.

Q. Are you acquainted with a man in Kotzebue by the name of Floyd Land? A. Yes, I am.

Q. To what extent, if any, did he assist you in the investigation of this case, beyond taking pictures? A. That's all.

Q. That's all? A. Yes.

Q. Is he still, since you have come to court here, have you given him any instructions or left him in charge of any information up there, to the marshal's office, to your knowledge?

A. No sir.

Q. Have you, as the marshal, given Floyd Land permission to break into the premises known as the Kotzebue Grill, since this trial has been going on?

A. No sir, I haven't.

Q. Has it come to your knowledge as to whether or not he has?

A. No sir, I really don't know.

Q. If such an act was committed it was without any official sanction, as far as you know?

A. Yes sir. [556]

Mr. Hermann: I would like to move to strike

(Testimony of Archie Adirim.)

this testimony on the grounds it is incompetent, irrelevant and immaterial.

The Court: I cannot conceive of any relevancy. If you are trying to impeach Mr. Land, he is not a witness here.

Mr. Crane: I am not trying to impeach Mr. Land. This is something that came to my knowledge.

The Court: What has it got to do with the issues here?

Mr. Crane: I cannot make a statement before the jury why I asked these questions. It wouldn't be fair. I have no hesitancy in telling the Court why I have asked them, if Your Honor wishes to know.

The Court: The jury will please retire to the jury room.

(The jury then leaves the room and retires to the jury room.)

Mr. Crane: It has just come to my knowledge, Your Honor, since adjournment of the Court at noon, that this building has been broken into by Floyd Land. Floyd Land has been more or less active in the investigation of this affair, as I have been informed. Also I happen to know his likes and dislikes and his position in this case. I wanted to find out if that breaking in of the building had any official sanction or was any part of this investigation. I think I had a right to do that because the man has been used somewhat in the investigation, although the marshal says only for the purpose of

(Testimony of Archie Adirim.)

taking pictures, to what other extent I don't know. That's what I want to bring out about this man.

The Court: That's all in evidence.

Mr. Crane: And I have asked the witness if he had any further participation or assistance in this investigation, and the only way I could find out was to ask the marshal.

The Court: Yes. Still I haven't heard where any such evidence is admissible here or what purpose it could possibly have. As I say, if you want to impeach the pictures, to show that the pictures were not authentic because he broke into the building last week, I cannot see where that would be logical.

Mr. Crane: Very well, Your Honor.

The Court: That's the only thing you could suggest? We are not trying Floyd Land.

Mr. Crane: Well to be perfectly frank, to put my position clearly before the Court, I learned of this instance during the noon hour and I haven't had an opportunity to brief up on the admissibility or whether it is admissible or not.

The Court: It is just a pure matter of logic, counsel.

Mr. Crane: Very well, Your Honor, I accept the Court's ruling. I am not arguing with the Court.

The Court: Very well.

Mr. Crane: I might state before the jury comes in, Your Honor, and before the testimony closes in the case—it is probably proper for me to re-

(Testimony of Archie Adirim.)

mark to the Court now, while the jury is absent, that we have a subpoena for Jerry Amundsen which was returned unserved. He couldn't be located in Fairbanks; he couldn't be located in [558] Anchorage. The news came back that he had left Marshall for Anchorage, and after a search that he had left for a trip to the States, and whether he is back in the Territory or not we have been unable to learn. But we have learned since the trial of this case and, as I say, over the weekend, that there is another witness who might corroborate the testimony of what Mr. Amundsen would testify to. I put in a call for that witness Saturday night, in fact got the operator, but he couldn't locate him, and he was to call me back Sunday and he didn't call me back. But I have found out now that this witness is back in Kotzebue but I haven't been able to interview him or contact him on the phone. Now if this case does go over until Wednesday morning we would like to reserve the right to put a witness on out of order, if I could get him down.

The Court: Before you rest, you mean?

Mr. Crane: Yes.

The Court: We will keep that in mind.

Mr. Crane: In other words, if we rest our case, I would like to reserve the right to put him on out of order.

The Court: While the jury is out too, what about this Jack Jones testimony? Where have you connected that up?

(Testimony of Archie Adirim.)

Mr. Crane: I think it is sufficiently connected by elimination of the can of gasoline in this entire case. I think we showed by the experiment of Mr. Gillis using the same ratio of fuel, one pint to a gallon, that the only thing that could have set a fire was a combination of outboard motor fuel, which is all over the place. [559] There are well over 300 motors in Kotzebue; they burn that type of motor fuel. We have eliminated the gasoline; we have eliminated the blazo, and we have shown that it was that motor fuel, if there was any incendiary fire, and we also experimented with one pint to a gallon, the same thing Jones testified that they used up and down the beach.

The Court: Well, there is apparently an inference which can be drawn from that. Very well.

(The jury then returned to the jury box.)

The Court: The objection raised to the questions asked the witness Archie Adirim with reference to Floyd Land has been sustained because they are not relevant to the issues of this case.

(There were no further questions and the witness was excused from the stand.)

Mr. Crane: If Your Honor please, at this time the defense rests, subject to the right, if we can get a witness here, to call him out of turn, if it goes over until Wednesday.

The Court: Very well. Does the Government have any rebuttal?

EDWARD J. HARKABUS

is then called as the first witness for the plaintiff in rebuttal, and having been sworn previously, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Harkabus, would you state whether or not you have performed any [560] incendiary tests since last time you testified? A. I have.

Q. Would you state the nature of these tests, please. Describe how they were set up and performed without yet giving any conclusions as to them.

A. Well, I took a soldering iron, which was a 50 watt, 110, 120 volt, and I placed it in a wastepaper basket with the tip intact on the soldering iron, and after six minutes it charred the paper sufficiently to ignite gasoline vapors, although I didn't put gasoline in it at that time for safety reasons. But I then took the tip off of it and used the heating element from the soldering iron. I conducted approximately thirty tests of this nature and in each case it ignited paper that I had utilized, various types of paper.

Q. Would you explain what types of paper?

A. Primarily, roller towel type paper, and kleenex, cellophane, newspaper and tablet paper, and in each instance the element ignited the paper.

Q. About how long would it take for the element to ignite it?

A. Anywhere from 2½ to 3 minutes.

(Testimony of Edward J. Harkabus.)

Q. Did you experience any failures at all, that is, any failures to ignite? A. I did not.

Q. Did you, at any time, use gasoline with these experiments? A. I did.

Q. On how many occasions?

A. Roughly, I would say approximately on ten tests.

Q. What type of paper?

A. I used the same type of paper that I had used with the element alone. [561]

Q. What were the results of those tests?

A. When I used toweling that had been previously saturated, it would take a little while for the heating element to dry out the gasoline to a sufficient temperature where it would ignite, but when it did ignite it would go off with a "whoof", as you understand gasoline does when it ignites.

Q. Did you perform any other tests other than those you have described?

A. I took the element and placed it down into a wastebasket and waited approximately three minutes and it ignited the paper that was in the basket.

Q. Mr. Harkabus, do you know Clara Salinas?

A. I have met her, yes.

Q. When did you meet her?

A. That would be December 30.

Q. Where at?

A. At her residence, at the apartment above the Rotman Store in Kotzebue.

Q. What was the purpose of your visit?

(Testimony of Edward J. Harkabus.)

A. To interview Mrs. Salinas, Mrs. Rotman.

Q. Concerning what?

A. I asked her the whereabouts of Mr. Salinas on Christmas Day, the day of the fire.

Q. What was her answer?

Mr. Taylor: Just a minute, Your Honor. We are going to object to a conversation with somebody out of the presence of the defendant. Proper foundation has not been laid.

The Court: The question is obviously asked by way of impeachment in contradiction of Mrs. Salinas testimony as a witness, and for that purpose may be allowed. [562]

A. Her answer was that Mr. Salinas had been around the hotel most of the day; however, it would have been possible for him to have gone from the hotel without her knowledge.

Q. No further questions.

Cross Examination

Q. (By Mr. Taylor): I take it from your testimony then, Mr. Harkabus, you did not conduct any tests with sawdust, either dry or sawdust that had been treated with gasoline or with blazo or with a mixture of lubricating oil and gas?

A. Let me answer this way, Mr. Taylor: that from my tests the ignition temperature of paper closely approximates the ignition temperatures of gasoline, sawdust and wood shavings. And inasmuch as I did not have sawdust available to me I did not conduct tests with it. However, based on

(Testimony of Edward J. Harkabus.)
my calculations, if I had conducted tests with those elements it would have ignited.

Q. You say it would have ignited?

A. Yes sir.

Q. That is your opinion, then, Mr. Harkabus. But you did not—my question is: you did not make any tests with sawdust then, with gasoline in it?

A. No sir, I had none available.

(There were no further questions and the witness was excused from the stand.)

ROBERT W. OLIVER

was then called as the next witness for the plaintiff in rebuttal, and having been sworn previously, testified as follows: [563]

Direct Examination

Q. (By Mr. Hermann): Mr. Oliver, are you acquainted with Clara Rotman Salinas?

A. Yes, I am.

Q. Will you state whether or not you conferred with her concerning this case?

A. Yes, I talked to her. I think it was about the evening of the 30th. Mr. Harkabus and I went over to the hotel there and talked to her, and then again we talked to her on the second of January in the evening, Deputy Marshal Adirim and myself.

Q. Well, as to the 30th, will you state what you conferred with her about on that occasion?

A. We talked to her about how they were noti-

(Testimony of Robert W. Oliver.)

fied of the fire. I asked her how she was notified of the fire, and we asked her if Mr. Salinas was there in the apartment?

Q. What was her answer as to Mr. Salinas being in the apartment?

A. As I recall, she said that he definitely was there from nine o'clock on. She said Jerry Amundsen was over there in the evening from about six o'clock to eight o'clock and that Harold Little was there, and that he left and she and Mr. Salinas were alone in the large front room of the apartment; and I recall she said she was sitting on the couch and in fact she said she was sitting on the couch she was sitting on at the time we talked to her, and that Mr. Salinas was sitting in the large chair by the window in the corner.

Q. Did she state whether or not Mr. Salinas was in the apartment all day?

Mr. Taylor: Just a minute, if your Honor please. We object to the question. Leading. [564]

The Court: Oh, I do not find it leading. He may answer. The question was whether or not she stated that Mr. Salinas was in the apartment all day. That does not suggest the answer.

A. She said he could have been out of the apartment.

Q. (By Mr. Hermann): Now, what was the other day that you interviewed her?

A. It was on the first or second of January, I think. As I recall it may have been on the first, in

(Testimony of Robert W. Oliver.)
the evening of the first of January. I don't recall exactly whether it was the first or second of January in the evening.

Q. Will you tell us what she said, if you recall what she said.

A. Yes. It was pretty much the same as before. My interest in interviewing her the second time was primarily to establish exactly who it was that notified them of the fire, and at that time she said Nannie Howarth notified them. And also I was interested in establishing at that time how Mr. Salinas was dressed when they were in the apartment, and further, whether or not he had been out during the evening. Again, I wanted to find out again from her.

Q. What was her answer?

A. Her answer was that he was not out in the evening.

Q. What, further, was said by Mrs. Salinas on that occasion?

A. She said Nannie Howarth was the one that came up and notified them. She said that it was possible that Mr. Salinas could have been out during the daytime, and she told us she was leaving herself within a day or so. I think the next day she was going to Anchorage.

Q. Did you interview her about any other subjects, other than Mr. Salinas' [565] whereabouts on the day of the fire and those other matters you testified to?

A. Well I did ask her whether or not there were

(Testimony of Robert W. Oliver.)
any business connections, if she had any financial interest in the Grill, and she said that she did not.

Mr. Taylor: I am going to object. That wouldn't be competent, relevant or material to the issues, as to whether or not she had a business interest in the Grill.

The Court: I think not. Also, it would not relate to her testimony that I can recall.

Mr. Hermann: I had not intended to bring that out particularly.

The Court: That remark may be stricken as not competent.

Q. (By Mr. Hermann): Was anything else discussed?

A. Well, I asked her if she knew where Mr. Salinas was at that time, and she said she did not know where he was.

Q. Will you state whether any mention was made concerning the inventory at the Kotzebue Grill?

A. No. It is my recollection that I asked her whether or not, if Mr. Salinas had anything there, or if he had any part of the building there at the Rotman business. I don't recall specifically discussing the inventory part.

Q. What did she say in relation to the first part there?

A. She said that he had no interest.

Mr. Taylor: I think that question is a little bit confusing. What is the "first part"?

(Testimony of Robert W. Oliver.)

Q. (By Mr. Hermann): What did she say in regard as to whether or not Mr. Salinas had [566] anything in the Rotman Store?

A. She said he had no financial interest in the store whatever, no interest in there. As I recall her words, "He has his business and I have mine. There is no connection."

Cross Examination

Q. (By Mr. Crane): Mr. Oliver, what you have testified to is all from your memory?

A. Yes, except refreshed somewhat by reading the notes of the deputy who was there at the time, and also from reading the notes of Mr. Harkabus.

Q. You didn't read any of your own notes?

A. No sir, I didn't make notes at the time.

Q. In other words, your testimony is just hearsay from somebody else's notes?

A. No sir, it's to the best of my recollection.

Q. Now, Mr. Oliver, you made an extensive investigation of this fire. Did you ascertain from the airlines, both Wien and Alaska Airlines, that are common carriers into Kotzebue, a list of the passengers arriving in Kotzebue from the 15th of December to the 25th of December?

A. No sir, I never did, and I don't recall ever having told the deputy to check into it.

Q. Never mind. Did you make any investigation of who was in town?

A. No, not unless we may have inquired some-

(Testimony of Robert W. Oliver.)

time if anybody else was around. We made no investigation of the airlines or passenger lists.

Q. Or any of the passengers that might have arrived during those dates? A. No sir.

(There were no further questions and the witness was excused from the stand.) [567]

Mr. Hermann: I wonder if we might take a recess now, your Honor?

The Court: Very well. We will take a recess until ten minutes after three.

(Thereupon, at approximately 3:00 p.m., the jury was duly admonished and court recessed.)

After Recess

(At 3:10 p.m., all persons necessary being again present, court reconvened and the trial of the cause was resumed. Both counsel stipulated as to the presence of the jury.)

The Court: Very well. We will proceed.

Mr. Taylor: Could I just interpose for a moment. The Clerk has been worrying about a book that I had marked for identification and I am going to relieve his worries about it by moving that it be withdrawn. It was marked as defendant's Exhibit 8 for identification.

The Court: After it was used I think we were to return it.

Mr. Taylor: We didn't even do that.

The Court: Yes, it may be returned.

(Defendant's Exhibit No. 8 for identification is returned to defense counsel.)

MARJORIE LINCOLN

is then called and sworn as the next witness for the plaintiff in rebuttal, and thereafter testified as follows: [568]

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

A. My name is Margie Lincoln.

Q. How old are you? A. 17.

Q. Where do you live, Margie?

A. Kotzebue.

Q. How long have you lived at Kotzebue?

A. Well, ever since I was born.

Q. Would you speak a little bit louder, please.

A. Yes.

Q. Do you recall the fire in the Kotzebue Grill last December? A. Yes.

Q. Do you know where you were at the time you heard about the fire? A. Yes.

Q. Where were you?

A. Well, I was at Pete Lee's.

Q. What happened after you heard about the fire? A. We started getting help.

Q. Where did you go? A. To Coffee Dan's.

Q. Would you speak up a little.

A. I went up to Coffee Dan's and Joe Brantley's house.

Q. Any place else?

A. After that I went to Steve's house. [569]

Q. Which house is that?

A. Rotman's Store.

Q. Whereabouts did you go in Rotman's Store?

(Testimony of Marjorie Lincoln.)

A. What?

Q. Whereabouts did you go in Rotman's?

A. Upstairs.

Q. Who did you see, if anyone, up there?

A. Clara Rotman.

Q. Where was she when you saw her?

A. She was in the back room.

Q. How was she dressed?

A. She was dressed in her nightclothes and bathrobe.

Q. About how long was that after you first heard about the fire that you saw Clara Rotman?

A. That was after 11:00.

Q. How long after you first heard of the fire?

A. About 10:15 or 10:30.

Q. You heard about the fire at 10:15 or 10:30?

A. Yes.

Q. Then how long after that was it that you got to Rotman's hotel? A. I don't know.

Q. Do you recall whether or not you saw any lights in the hotel?

A. Well, there was a light in the back room.

Q. What do you mean by the "back room"?

A. It's their living room. [570]

Q. In their living room? A. Yes.

Q. Was there a light any place else?

A. No.

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Margie, when you say you

(Testimony of Marjorie Lincoln.)
saw a light in the living room, you mean the front part of Clara's apartment facing the sound, do you? A. Well——

Q. Well, what do you mean by the living room?

A. In the back of her place there, where it's in the back. I can't——

Q. Well, you have been upstairs in Rotman's haven't you? A. Yes.

Q. These lights that you saw were in Clara's apartment, is that what you mean? A. Yes.

Q. That's where it was that you saw it; the back is that part facing Kotzebue Sound?

A. Yes.

Q. Margie, did you see Floyd Land at the fire that night? A. No.

Q. Did you see him prior to the fire that evening? A. I think I heard him around.

Q. What?

A. I think I heard him around there. [571]

Q. What was he doing?

A. Helping with the fire, I think.

Q. Did you see him around the building before the fire? A. No.

Q. Did you see him in front of the house before the fire? A. No, he wasn't around.

(There were no further questions and the witness was excused from the stand.)

REX BOWEN

was then called as the next witness for the plaintiff in rebuttal, and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Bowen, would you please tell the Court and jury your full name?

A. Rex Roy Bowen.

Q. What is your occupation?

A. I am manager of the N. G. Hansen Trading Co. at Kotzebue.

Q. What type of firm is that?

A. A general merchandise firm.

Q. You sell what type of items?

A. We sell food supplies, drug items, clothing, hardware, everything in that line.

Q. Do you know the defendant, Natividad Salinas? A. Yes.

Q. Would you speak just a little louder, please. Do you know the [572] defendant, Natividad Salinas? A. Yes.

Q. What was the last time you have seen him?

A. The first week of this month, along the 6th or 7th.

Q. Where did you see him?

A. At Kotzebue.

Q. Was there any particular purpose to your seeing him on that occasion? A. Yes.

Q. What was it?

A. He offered to sell me some meat in the cold storage plant.

Q. Where did you see him at?

(Testimony of Rex Bowen.)

A. He came into the store, our store.

Q. What did you do in respect to his offer to sell the meat?

A. Well, I was interested in it and went over and looked at it.

Q. Where was it?

A. In the Kotzebue Grill.

Q. Whereabouts in the Grill?

A. In the locker room, in the cold storage room.

Q. About how much meat was there, if you know?

A. I judged there were probably between 350 to 500 lbs. in there.

Q. How long did you stay back in the cold storage room?

A. Probably 20 minutes, in the cold storage room.

Q. What did you do then?

A. Then we came out into the kitchen part of it and talked a few minutes.

Q. What were you talking about there? [573]

A. We talked about the value of the building. He made me an offer to sell it.

Q. What was his offer?

A. Well, he offered to sell it for $10,000.00.

Q. Will you state what that was to include, the price?

A. Well, that was to include the building and the fixtures in it.

Q. Did he at any time ask you to place a value on the building?

(Testimony of Rex Bowen.)

A. Yes. He started the conversation by asking me what I thought it was worth.

Q. What was your reply?

A. I told him I wasn't a judge of buildings and property in Kotzebue because I hadn't bought or sold any, but I would guess maybe $15,000.00.

Q. Was his offer of $10,000.00 made before or after you said $15,000.00?

A. That was after.

Q. Now are you familiar with the Grill building itself? Have you been in there before the fire?

A. Yes.

Q. How many times have you been in it about?

A. Oh, maybe a couple of times a week.

Q. From being in it have you observed any of the machinery and equipment?

A. Well, I haven't been in the back part very often, but occasionally I have been in there and noticed what was there.

Q. Would you state whether or not the machinery and equipment appeared to be new or used?

A. Well the equipment is used but it seems to be in pretty good shape. [574]

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Mr. Bowen, this offer of Steve Salinas, you say was made to you a couple of weeks ago?

A. No longer than that. The day was the first Monday in April. That was the 7th.

(Testimony of Rex Bowen.)

Q. That would be on the 7th of April?

A. Yes.

Q. The fire occurred in December?

A. Yes.

Q. Did not, at the time Mr. Salinas made you this offer on the building, was it not after he knew he had to come down here for trial and wasn't it after his case was set for trial?

A. Yes, I would imagine so.

Q. In other words, it was a sacrifice sale of the place, wasn't it?

Mr. Hermann: If your Honor please, I object. That calls for an opinion of the witness.

The Court: Well, he may be asked whether anything was said as to a sacrifice offer. Otherwise it surely is a conclusion you are asking for.

Q. (By Mr. Crane): Now in relation to going over this equipment—he asked you about the equipment in the restaurant. I will ask you if you went in, going out of the restaurant, to the warehouse directly behind the restaurant, that is stored full of equipment. Did you notice in there the electric grills, electric [575] toasters, a lot of electric appliances that were practically new and unused?

A. No, Fred, I can't say that I did. There was equipment in the kitchen though.

Q. There was equipment in the kitchen?

A. Yes.

Q. That equipment was all serviceable equipment as far as you could see?

A. As far as I could see.

(Testimony of Rex Bowen.)

Q. Did you notice the meat saw, any of the electric equipment back there?

A. I noticed the meat saw.

Q. That was serviceable, was it not?

A. Without examining it I couldn't tell.

Q. Approximately what is the cost of one of those meat saws?

A. We bought one that came up on the boat in the summer and we paid around $320.00.

Q. Electric appliances and electric fixtures are rather costly in Kotzebue, are they not, taking into consideration the freight rates and present prices of them? A. Well, yes, they are.

Q. And you put a value of $15,000.00 yourself on the building after the fire? A. Yes.

Q. And the place has been idle, as you know, since Christmas? A. Yes. [576]

Mr. Crane: That's all.

(There were no further questions and the witness was excused from the stand.)

Mr. Hermann: We have no further rebuttal.

The Court: Do you have any sur-rebuttal, counsel?

Mr. Crane: No, Your Honor. If it's the present idea of the Court to hold court tomorrow—as I stated out of the presence of the jury regarding some witnesses, if this case—it is now 3:30; if this case could now go over until tomorrow, we would ask for adjournment at this time, reserving the right of putting one witness on if he can be located. We are still attempting to locate him, Your

Honor, making every effort possible. But we will not delay the trial beyond tomorrow morning.

The Court: I very much doubt the evidentiary value of the testimony from the witness you propose, from what you stated. However, it might possibly be material; it might conceivably be material.

Mr. Crane: I don't believe Your Honor understood what I intended to prove by this witness.

The Court: I think I did. But I would not deny you that opportunity if you believe it is material, of course. It does seem that we could not conclude this case today very readily, and allowing an hour to each side for argument. Even if the argument were short it would run us overtime and would be burdensome, I am sure, to the jury. When we planned our calendar I had taken the view that I [577] might adopt the oral opinion of the Attorney General, as to which I had been informed, and it was rumored, that so far as Territorial offices are concerned primary elections could be considered as general elections. Now I have no official notice of that. At that time we did not anticipate that we would be so far behind in our calendar as we now are. Upon reflection, I am inclined very much to doubt it. The statute provides first that holidays shall be non-judicial days upon which no court shall be held, except with certain exceptions not applicable here, such as to receive verdicts of juries and so on; and another section of the statute provides what are legal holidays and includes this language: "The days on which a gen-

eral election is held throughout the Territory of Alaska". Now as far as I can recall in my memory of over thirty years since I first came to Alaska, I have never heard of a primary election being considered a general election. It is certainly separately treated in the statutes. There is provision as to primaries. There is provision as to primary elections to the effect that all provisions of the laws of the United States and the Territory relating to qualifications of voters and notice and conduct of general elections, counting of ballots, and so on, shall govern the conduct of primary elections where applicable. So a clear distinction is made in the statute itself between a general election and a primary election. I am inclined to believe that the purpose of the Attorney General was purely to be able to give the Territorial officials a holiday, and unless counsel wish to raise that point, I do not feel I need [578] go along with an oral opinion, if it were true, with respect to non-judicial days. But if counsel wish to raise that point and there is question about it, I would not like to endanger the whole case, of course.

Mr. Taylor: Your Honor, I would gladly state that I agree with Your Honor's opinion in this. I likewise have practiced many years in the Territory of Alaska and this is the first time I have heard that raised. We have always considered a primary a nominating election and nothing else, and not a general election.

The Court: That has always been my recollection.

Mr. Taylor: You can rest assured, Your Honor that we would not raise the question, Your Honor, in any way whatever.

The Court: It would seem then if we should recess this case now it would give counsel ample time to prepare argument in the case, which would no doubt take some preparation after over five days of testimony, and also permit me a little further time to complete instructions.

Mr. Crane: If Your Honor please, I notice Your Honor mentioned that we could consume an hour to each side. I wonder if it could possibly be longer because we have two counts in this indictment, and we have a week's testimony, and I doubt if we could cover it.

The Court: Well, I am quite willing. We could have longer than an hour. I think probably we should place a limit on it which wouldn't inconvenience anyone, and then counsel may split it as they wish. Otherwise it would be rather difficult because both sides might [579] then claim favoritism. So how about an hour and a half—how about an hour on each count. That probably would be more like it. Two hours to a side, if you require that much.

Mr. Crane: I doubt if we will use that much.

The Court: Suppose we put that limit on it.

Mr. Hermann: Two hours to each side.

The Court: It won't be hard to split it counsel?

Mr. Hermann: Yes.

The Court: That will give us ample time tomorrow, then, to conclude the case without wearing

out the Court and jury. I would like counsel to remain just a few moments with respect to an oral instruction that was requested, or if you have any other requested instructions. Very well, then, we will recess this case until tomorrow morning.

(The Court then duly admonished the jury and excused the jury until ten o'clock the following morning.)

The Court: Now do either counsel have any requested instructions?

Mr. Taylor: I have two, Your Honor. Possibly the Court already has instructions that will certainly fit on these matters.

(Mr. Taylor thereupon submits two requested instructions to the Court.)

The Court: Requested Instruction No. 1, I am not familiar with the presumption that is covered here. There is only one case cited here and that is one which would not be available in [580] our library here. Could you tell me what text you got this from?

Mr. Taylor: No. 1?

The Court: Yes.

Mr. Taylor: I believe it was Ruling Case Law.

The Court: Ruling Case Law has been superseded, really, by American Jurisprudence, but I will look into that.

Mr. Taylor: It might be. This is just another way that a presumption—a man is presumed to be innocent until proven guilty beyond a reasonable doubt. I do have two more instructions that had not yet been typed up, but I would like to type

them up and submit them to the Court this afternoon, if I could.

The Court: Well, No. 2; we have this covered to a little different degree, *at* to extent at least, where a building is not inhabited as a dwelling for several months. I have prepared an instruction where a building is abandoned to such use, and it may be that failure to inhabit it as a dwelling for several months——

Mr. Taylor: Well that would raise a question.

The Court: It would be possible, again, that it would be applicable here were it not for the statute which requires no occupancy. These are all Delaware cases you cite here. However, I will look into it. I doubt, however, if that law is under our jurisdiction.

Mr. Crane: Maybe, Your Honor, we could save time. Mr. Taylor stated that he has some instructions that are not typed up. Maybe he could give them to Your Honor orally. It might save time for [581] the both of us.

Mr. Taylor: I have these notes, more or less in the nature of thoughts down on paper—if the Court would like to look at them. In fact it might show whether the Court has instructions on those particular points or not.

The Court: They would be sufficient.

Mr. Hermann: I have not seen them.

The Court: Well as to No. 3, I have that covered, as to one of the essential elements that must be proven. We will show this to you then, Mr. Hermann.

I have No. 4 covered also, only a little differently with respect to the two counts. One of them requires that a person arrange to have set or cause to be set wilfully and maliciously and so on. As to Count 2, that must be shown that it was wilful and with intent to defraud the insurer.

As to those two they are covered.

Now, Mr. Crane, or I guess it was you, Mr. Taylor, suggested to me Saturday, orally, that the jury are entitled to an instruction to the effect that if they do not find the defendant guilty under Count 1, they must also find him not guilty under Count 2. Now I am inclined to believe that position is correct because the essential element of a wilful burning is applicable to both counts.

Mr. Hermann: However, there is the element of a dwelling house that they take so much issue as to Count 2.

The Court: Well, I am including a lesser degree. [582]

Mr. Hermann: You are including a second degree? Well, in that case they could find him guilty—as long as they find him guilty of one degree they could find him guilty of the second count.

The Court: If he is not guilty of arson in either degree he could not very well be guilty of the second count.

Mr. Taylor: That's true of both degrees.

The Court: Well, in ruling the other day, on the ruling on the motion to dismiss, I felt it necessary to submit to the jury the lesser included offense of the lesser degree of arson, where an

issue is raised as to whether this property is a dwelling house.

Mr. Hermann: Then their second instruction would have to be changed a little, if given at all, as to arson——

The Court: Well, that's within reason.

Mr. Hermann: I do wish to object to that word "inhabit". We have a statute which says whether "occupied, unoccupied or vacant", and whether uninhabited is the same as unoccupied I cannot say. As to their first instruction, I have no objection except that it might be a little strong in the way it ends. I think instead of this "prosecution must overcome this presumption", that it should be something to the effect that the presumption that a fire is accidental remains until overcome by competent evidence. I think that would be more accurate.

The Court: Well, again, this is a re-hash or restatement of the rule of reasonable doubt.

Mr. Hermann: They say fires are presumed to be accidental until [583] proven otherwise.

The Court: Doubtless your instruction No. 1, unless re-phrased, would be immaterial probably.

*** *** I would like to know if there is an instruction as to "wilfully" and "maliciously". Wilful, as I understand the definition, is voluntarily, and malicious is if it is wrongful, that is, with intent to set fire?

The Court: That is not precisely the meaning. Wilfully means intentionally and not accidental,

and maliciously is with intent, wrongful intent or motive. That is legal malice not actual malice.

Mr. Taylor: If Your Honor please, we will want to make a motion for judgment of acquittal on both counts. I think those should be made formally tomorrow morning.

The Court: Could you do that at this time?

Mr. Crane: A renewal of our other motion.

The Court: Just wait until we finish this instruction business.

Mr. Hermann: Then you would say it is sufficient to show malice as distinguished from—well, in effect that it is not accident?

The Court: Wilfullness must be distinguished from what is accidental or accident; malice includes the question of wilfullness but it means with a wrongful design or motive.

Mr. Hermann: I think that would be close enough anyway.

The Court: That is the accepted definition of malice.

Mr. Hermann: I have no further instructions. I wonder if the Court's instructions will be available tomorrow morning? [584]

The Court: Yes. I will have them ready, I think, at the time of argument, or a little sooner if you wish.

Mr. Hermann: We would appreciate it; I am sure both of us would.

Mr. Taylor: I would now, at this time, move that the Court enter a judgment of acquittal of the defendant of the charges contained in Count 1

and Count 2 of the indictment, on the grounds there is not sufficient evidence to go to the jury, as the Government has failed to prove any of the essential elements of the case. They have not shown in any manner whatsoever that Mr. Salinas had the opportunity or the intent to set the fire. The fact that they have shown a lien against the property—we have shown the lien was paid off very shortly after it was put on. We have shown by competent testimony that Mr. Salinas could not have set the fire because he was at the Rotman Hotel at the time when the fire was set. We have also shown, Your Honor, that at the time in which the prosecution witnesses stated that he was at the Rotman Hotel, that somebody had entered the Kotzebue Grill and the lights were lit upstairs. That was around seven o'clock. At ten minutes to seven there was no light up there. At ten minutes past seven a light was there, and another party saw lights up there at 7:15; and also that during the entire afternoon, you might say, the principal witness for the prosecution, Brantley, was up there three times. He was three times in the Kotzebue Grill. The second time was 4 o'clock in the afternoon. There was no indication that anybody had been up there. He [585] was two times in the attic, and there was no indication that anybody had been up there and had gone into the attic. And the evidence is that thereafter that Mr. Salinas had no opportunity to go up there and make any overt act, commit any overt act toward burning the place. And so we feel, Your Honor, that in view of the

total failure to connect Mr. Salinas with the commission of either one of these charges, especially the arson, and furthermore that the intent has been negative as to injure an insurer, that there has been no claim, Your Honor, for loss that occurred by this fire.

The Court: I have thought of that.

Mr. Taylor: Mr. Salinas has had that insured for a couple of years. He has paid his premiums and at the time of the fire he was paid up, and after he was notified—a notice was sent which he did not get until recently—he paid $1,500.00 more to the insurance company. We feel, Your Honor, there is a total failure of proof of intent to defraud the insurer; that he has paid thousands and thousands of dollars into the insurance company, and even today, by reason of the small amount of damage, he has not filed his proof of loss. And we think those matters are sufficient, Your Honor, that it should not be allowed to go to the jury. I think also from the statement of the United States Attorney in his opening statement, that he used a torch, made a torch out of a soldering iron and put it in the sawdust and started the fire—now that is one thing, Your Honor, which they have failed to do. They have brought in here a piece of tubing which evidently was part of a soldering iron at one time, because [586] it is similar to this new soldering iron which is in evidence. But that tubing, not the point, Your Honor, was the only thing that was found in the attic. This little rig here, that is Exhibit E, now, this, Your Honor, was

downstairs, down on the top floor. It was not in the attic. I have not taken this apart. I think it is the province of the jury to take that apart, but I believe inside that handle, Your Honor, the jury will find a piece which would go with these here (indicating), but which has not been shown here as an essential part of the soldering iron. Now we have had a number of tests made as to what is the ignition, about the ignition of sawdust, and they were made under conditions a lot more favorable to the ignition of it, that were conditions in the attic. And I believe very reliable people, the contractor and Mr. Lewis, who assisted and who testified here, I think, in a very logical manner, and I think his testimony should go a long ways to show that if any attempt to burn was made with a soldering iron that it would have fallen far short of what it did.

Now in addition to these two parts, Your Honor that they say was made up to a torch, they have here a cord, a connecting cord, which one lady here testified was the cord to her steam iron. But Your Honor, they haven't shown one place where this could have been plugged in. There is no showing as to any way it could have been conducted to a live line, and Your Honor, we feel that under the circumstances, under the testimony, that the only thing that—that the Government has indulged in conjecture and conclusions and not facts. [587]

Now, also, in addition to that, your Honor, I would like to move that the second count in this indictment be dismissed upon the grounds that it

does not state facts sufficient to allow the case to go to the jury in that it only alleges the act was wilfully done and that it was set wilfully. Now under the case of Murphy vs. the State of Oregon, 290 P. 1096, the Supreme Court of Oregon held that the word "malicious" is a necessary ingredient in a charge of arson for the purpose of defrauding an insurer.

The Court: That is not what our statute says.

Mr. Taylor: As I recall our statute it says "wilfully", but a lawful act can be done wilfully. But they say it must be maliciously. Their Act is very similar, and in that case the Supreme Court said that the indictment did not charge the defendant with maliciously having burned a building, and held it was insufficient to charge arson. They also said that where the evidence is circumstantial that the defendant must be acquitted if the circumstances are as consistent with his innocence as his guilt. Now in this case, your Honor, there is not one scintilla of evidence to connect Mr. Salinas with arson. The testimony of all the witnesses is just as consistent with innocence as with guilt, and I think it is incumbent on this Court, your Honor, at this stage of the proceedings to dismiss Count 2 and direct a verdict of acquittal or a judgment of acquittal as to Count 1..I think if we put this to the jury it is going to require the jury to indulge in guesswork and conjecture and conclusions not based upon facts because there is no place in this [588] thing that you can connect the defendant with arson. He has not been shown to be in

the vicinity of the place; he has not been shown to have any ulterior motive of setting the place on fire. He had insurance. He had insurance paid for, but he has not tried to collect any insurance, and also, your Honor, there has been no proof of loss, so we think, your Honor, that such skimpy, scanty, you might say negligible, proof of this defendant having anything to do with the fire would not be proper to submit to a jury.

The Court: Well, sir, I still very much believe in the fundamental principle that a Court in trying an action with a jury may not usurp the function of the jury, and where there are issues of fact which are controverted that those issues must be submitted to the jury. It is true that courts have sometimes done that very thing, but they have been criticised for it. Mr. Melvin M. Belli in his recent book "Ready for the Plaintiff" in tort cases criticises actions of which he calls the 13th juror, and I believe that any trial judge should avoid that very thing. It is true we may grant a motion for judgment of acquittal if the court finds that there is not sufficient evidence to be submitted to the jury where there is no real issue of fact, either that the crime has been committed or that the defendant is connected with the commission of the crime. I see no different situation now in this motion that at the conclusion of the Government's case except that we have even more a situation of conflict in the evidence. The testimony of Mr. Harkabus upon his opinions as to the origin and cause of the fire [589] is in con-

flict with that of Mr. Gillis, Mr. McKenny, and there is an issue of fact for the jury to decide as to which opinions are founded on the best reasons. It is true that the defendant has established an alibi through his wife, but there is a conflict of evidence there too, because there was at least one witness, Mr. Goodwin, as I recall, who testified that he had seen Mr. Salinas between 3:00 and 5:00 at Little's on that same afternoon. So we cannot accept the alibi as uncontroverted. It is true that there is evidence which would tend to contradict the evidence of the plaintiff with respect to somebody being in the place at 7:00, but that again is an issue of fact for the jury.

It is true that the evidence is circumstantial, but the law recognizes circumstantial evidence as a competent method of proof, and it is the jury who must judge as to the weight of it and how convincing it is on either side.

With respect to the argument that such circumstances must be wholly inconsistent with innocence and wholly consistent with guilt, the Supreme Court in a very recent case of Holland vs. the United States, 348 U. S., I think clearly did away with that principle, which had previously been given to juries as an instruction, and said that although there is some authority for it to the contrary, the better rule is that circumstantial evidence is competent evidence and the rule of reasonable doubt applies. So that theory, although it had been expounded by many courts is now wholly set aside

by the Supreme Court of the United States, and that, of course, is conclusive. [590]

The fact that the defendant has not tried to collect insurance, which seems to be granted, that he has made no proof of loss as yet, is a circumstance, yes, but not a conclusive one. Many inferences could be drawn from that and it is up to the jury to draw the inference of whether it is proof or not proof.

As to the second count, it may be that under the old law of Oregon, the element of malice is an essential element of a crime of burning with intent to defraud an insurer, but it is not an essential element of the crime as defined by our statute. Our statute says a wilful burning with intent to defraud constitutes the offense charged. Malice is an element of arson but not of this lesser degree, lesser offense.

I am convinced, gentlemen, this is purely a question for the jury and one in which the Court may not usurp the function of the jury and grant a motion for judgment of acquittal.

Therefore, both motions, the motion as to both counts, must be denied.

Oh, I might add one thing on it. Counsel suggest that there has been no proof, as the District Attorney first announced, that the building was over-insured. Well, there is a conflict of evidence there too, which should go to the jury. But even that motive was not necessary to be shown on the arson charge.

Mr. Hermann: That's right. Merely evidence of intent. As a matter of fact, no motive need be shown on the arson charge.

The Court: It has been so held. Intent to defraud must, of [591] course, be shown on the second charge, but intent may be proven by circumstances, naturally. Yes, I am convinced this is purely a question for the jury as to both counts.

Mr. Hermann: As to the separate motion for dismissal of Count 2, your Honor, is the Court overruling that also?

The Court: Yes. I thought I had so indicated, that I deny the motions as to both counts.

Very well, we will recess this case and adjourn court then until 10:00 tomorrow morning, at 10:00 o'clock.

Did I make clear the ruling on these instructions. I think I said I would rule on them in the morning but I believe we can dispose of them now.

Defendant's requested Instruction No. 1 I think is substantially correct and will be given in substance.

No. 2, I fear does not comply with our statute and must therefore be refused. However, we will instruct the jury as to abandonment for use as a dwelling constituting no longer any such use as a dwelling. As I said before, the Legislature must have had some reason to make that change and I do not know what the reason is.

Mr. Hermann: I have the legislative enactment on it when they did, and they specifically added

that part "occupied, unoccupied or vacant", and the original bill didn't even have it.

Mr. Taylor: That statute wouldn't hold up because it has been the common law from time immemorial that a person had the right to burn his own property as long as he doesn't injure others.

The Court: That ancient principle has long since been done away with in arson statutes, by statute.

Mr. Taylor: But if there is any change of the common law which also interferes with a person's constitutional rights? Their right to do with their property as they see fit, as long as they do not harm somebody else? If a person wants to burn his house, he should have the right to do it.

The Court: That has long since been done away with, counsel. The matter of occupancy is the only real departure from our law as it existed here for a great many years.

Mr. Taylor: You mean he couldn't burn his own house, your Honor?

The Court: I say that under the ancient common law it was not a crime but that that principle has been departed from in all states.

Mr. Taylor: Only by statute. So then if a person had a lot and shack and he wanted to get it cleared and he burned it down, then Mr. Hermann would have him in for arson? Is that right?

The Court: Well, if it is a wrongful act, maliciously done. And I think to be a malicious act it must be wrongful; it must be with evil intent or evil motive. And there is your difference. I think

if I had a shack and permission from the fire marshal to burn it down, I could burn it down and not commit any crime, but that would not be a malicious act.

Mr. Taylor: Well, a person is liable to prosecution for [593] destroying his own house then?

The Court: That is true.

Mr. Taylor: I will assure the Court that I will see if I can't get that law changed if I go down to the Legislature. I think it is a little bit severe. It certainly is in controversy with the common law—"occupied or unoccupied".

The Court: Yes, it departs from the common law. Well, we did not make the law. We will adjourn then until tomorrow morning.

(Thereupon at 4:10 p.m. court adjourned for the day.)

Be It Remembered that at 10:00 a.m. April 29, 1958, court reconvened and the trial of this cause was resumed. The defendant and all other persons necessary were again present, and both counsel stipulated as to the presence of the jury. The Honorable Walter H. Hodge presided.

The Court: We will proceed then.

Mr. Crane: No further rebuttal.

Mr. Hermann: No sur-rebuttal.

Mr. Crane: The defense rests at this time.

The Court: We will proceed then with the argument of counsel.

(Both counsel stipulated that the argument need not be reported, and the reporter was then excused from the courtroom.) [594]

(At the conclusion of argument the alternate juror was dismissed and the Court then read his instructions to the jury, after which the jury was placed in charge of sworn bailiffs and retired to consider its verdict.)

Be It Remembered that at 9:30 a.m., April 30, 1958, Court reconvened, the defendant being present in court with his counsel, Mr. Taylor and Mr. Crane; the United States Attorney, Mr. Russell R. Hermann; the Honorable Walter H. Hodge presiding, the jury being present in the jury box.

(At this time the foreman of the jury informed the Court that the jury had not yet been able to agree on a verdict. The Court thereupon read additional instructions to the jury after which it again retired in charge of the sworn bailiffs for further deliberation.)

This will certify that I, Mary C. Diede, in my official capacity as Court Reporter, Second Judicial Division, District of Alaska, did report the oral proceedings in open court in cause No. 1642, United States vs. Natividad Salinas, on the dates of April 21, 22, 23, 24, 25, 27, 28, 29, and 30, 1958, at Nome, Alaska.

That I reported such proceedings in stenograph

machine shorthand and that the foregoing pages numbered 1 to 595 incl. contain a full, true and correct transcript of such proceedings, with the exception of certain argument of counsel as indicated therein, prepared by me from my original notes to the best of my knowledge and ability.

Dated at Nome, Alaska, this 29th day of August, 1958.

/s/ MARY C. DIEDE

[Endorsed]: No. 16231. United States Court of Appeals for the Ninth Circuit. Natividad Salinas, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Second Division.

Filed and Docketed: October 27, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16231

NATIVIDAD SALINAS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellant states the following points upon which he will rely upon appeal.

1. The Court erred in denying Defendant's motion for acquittal made at the conclusion of the prosecution's case.

2. That the verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. That the Court erred in refusing to compel prosecution to elect upon which count Defendant be prosecuted.

5. The Court erred in overruling Defendant's motion to dismiss Count II of the indictment upon the grounds that it failed to allege facts sufficient to constitute a crime.

6. The Court erred in overruling Defendant's motion for judgment of acquittal on both counts of the indictment made at the close of the prosecution's case; and, at the close of all the evidence.

7. On the grounds of newly discovered evidence which; (a) was discovered since the trial; (b) the testimony was material to establish an alibi for Defendant, but the witness could not be located prior to the trial, although subpoena had been issued and placed in the hands of the U. S. Marshal; (c) the testimony is not cumulative or impeaching; and, (d) is material to the issues involved; and, (e) it is of such a nature that, on a new trial, the newly discovered evidence would produce an acquittal.

8. That the verdict was a compromise verdict coerced by the Court's refusal to discharge the jury for thirty-one (31) hours after the jury had reported that they were deadlocked and could not agree.

9. Misconduct on the part of the bailiff in conversing with the jury and securing a dictionary for the jury without the consent of the Court and counsel. That the said dictionary contributed to the arrival at a verdict as the jury did arrive at its verdict approximately forty (40) minutes after securing the dictionary.

10. That the verdict is erroneous for the reason that the crime of arson in the second degree is not an included crime in arson in the first degree; and

for the further reason that when the jury found the Defendant not guilty of arson in the first degree and not guilty of arson with intent to defraud an insurer, they in effect found Defendant not guilty of included offenses, and also found that there was no malice, intent or motive involved.

11. The Court erred in instructing the jury it could bring in a verdict of guilty of arson in the second degree.

12. That the Court erred in not setting out in the instructions a definition of arson in the second degree.

13. The verdict is inconsistent in that there were two offenses growing out of the same set of facts, and one offense includes elements or acts necessary to the commission of the other offense, a verdict of acquittal of one is inconsistent with a verdict of guilty of the other.

Dated at Fairbanks, Alaska, this 21st day of October, 1958.

FRED D. CRANE,
WARREN A. TAYLOR,
WARREN WM. TAYLOR,
Attorneys for Appellant.

/s/ By WARREN A. TAYLOR,
Of Counsel.

[Endorsed]: Filed October 23, 1958. Paul P. O'Brien, Clerk.

No. 16231

United States Court of Appeals

for the Ninth Circuit

NATIVIDAD SALINAS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 304, inclusive)

Appeal from the District Court for the District of Alaska, Second Division

FILED

MAR 22 1959

PAUL P. O'BRIEN, CLERK

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—direct 353
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—direct 289
—cross 311
—redirect 327
—recross 329
—rebuttal, direct 594
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Henry, Sam
—direct 182
—cross 185

Ipalook, Esther
—direct 215
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Kowunna, Abraham
—direct 172
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Lincoln, Marjorie
—rebuttal, direct 603
—cross 604

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—direct 198
—cross 210
—redirect 214
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—direct 163
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NAMES AND ADDRESSES OF ATTORNEYS

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Kotzebue, Alaska,

TAYLOR AND TAYLOR,
Room 320, Chena Building,
Fairbanks, Alaska,

Attorneys for Appellant.

RUSSELL R. HERMANN,
United States Attorney,
Federal Building,
Nome, Alaska,

Attorney for Appellee.

In the United States District Court for the District of Alaska, Second Division

No. 1642 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIVIDAD SALINAS, Defendant.

INDICTMENT

Chapter 141 SLA 1957

(Sections 65-5-1 and 6 ACLA 1949 as Amended)

The Grand Jury Charges:

Count One

That on or about the 25th day of December, 1957, at Kotzebue in the Second Division of the District of Alaska the defendant Natividad Salinas willfully and maliciously set fire to and burned a dwelling house which contained a restaurant known as the Kotzebue Grill and which contained living rooms on the second floor, the property of himself. (Section 65-5-1 ACLA 1949 as Amended by Chapter 141 SLA 1957.)

Count Two

That on the 25th day of December, 1957, at Kotzebue, in the Second Division of the District of Alaska the defendant, Natividad Salinas willfully and with the intent to injure and defraud the insurer caused a building known as the Kotzebue

Grill building to be burned while it was insured against loss or damage by fire. (Section 65-5-6 ACLA 1949 as Amended by Chapter 141 SLA 1957.)

A True Bill.

/s/ LUTHER DUNBAR,
Foreman.

/s/ RUSSELL R. HERMANN,
United States Attorney.

Bail $5,000.

[Endorsed]: Filed February 24, 1958.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. The oath means that you are not to be swayed by passion, prejudice or sympathy, or to be influenced or governed by sentiment or conjecture, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is

equally your duty to accept and follow the law as given to you in the instructions of the Court.

No. 2

The defendant is charged in Count No. 1 of the Indictment with the crime of arson in the first degree, committed as follows:

"On or about the 25th day of December, 1957, at Kotzebue in the Second Division of the District of Alaska the defendant Natividad Salinas wilfully and maliciously set fire to and burned a dwelling house which contained a restaurant known as the Kotzebue Grill and which contained living rooms on the second floor, the property of himself."

The defendant is also charged under Count No. 2 of the Indictment with the crime of burning property to defraud the insurer, committed as follows:

"On the 25th day of December, 1957, at Kotzebue, in the Second Division of the District of Alaska the defendant, Natividad Salinas wilfully and with the intent to injure and defraud the insurer caused a building known as the Kotzebue Grill building to be burned while it was insured against loss or damage by fire."

To each count of the Indictment the defendant has entered a plea of not guilty which casts upon the United States the burden of proving each and every material allegation of such charge beyond a reasonable doubt.

Each count set forth in the Indictment charges a separate and distinct offense. You must consider

the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendant. He may be convicted or acquitted upon either or both of the offenses charged, depending upon the evidence and the weight you give to it, under the Court's instructions; provided, however, that as the wilful burning of the defendant's property is an essential element of both charges, if you find the defendant not guilty of the charge of arson, you must also find the defendant not guilty of the charge under Count No. 2.

No. 3

The law of Alaska defines the crime of arson as charged in Count No. 1 of the Indictment as follows:

"Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, * * * whether the property of himself or of another, shall be guilty of arson in the first degree, * * *"

The substance of the offense charged is a wilful and malicious burning of one's property. "Wilfully" means intentionally and not by accident or inadvertence. "Maliciously" as used in this statute, does not mean hatred or ill will, but means a wrongful act done intentionally without legal justifica-

tion or excuse. Before you can find the defendant guilty of the crime of arson as charged in such Count, the Government must prove beyond a reasonable doubt that the defendant intentionally and wrongfully set fire to the building owned by him, and that such building was a dwelling house. To constitute a dwelling house within the meaning of this statute, it is necessary that it be shown that the building was ordinarily used or occupied in whole or in part as a dwelling, although it is not necessary that it be shown it was actually so occupied at the time of the fire. A building may be a dwelling house within the meaning of this term although part of it is used for other purposes.

A burning or actual fire is also an essential element of the crime of arson. It is not necessary, however, that the building be consumed or materially injured, but it is sufficient if any part is burned, however small. It is not necessary that the fire should continue for any particular length of time and the offense will be complete although the fire is put out.

The essential elements of the crime of arson as charged in such Count which the Government must prove beyond a reasonable doubt are: (1) that on or about the date charged and at the place charged in the Indictment, the defendant set fire to the building described in the Indictment, or caused it to be set on fire; (2) that there was an actual fire or burning as defined above; (3) that such act was done by him wilfully and maliciously as these terms are defined above; and (4) that the building

was at the time of the fire intended to be occupied in whole or in part as a dwelling house.

3-A

If a building previously occupied in whole or in part as a dwelling house has been abandoned as to such use, it is not a dwelling house within the meaning of this statute. To constitute abandonment there must be a removal or discontinuance of such use with definite intent not to return. A building does not cease to be a dwelling house during the temporary absence of its occupant.

There is included in the offense of arson in the first degree as charged in the indictment, the lesser offense of arson in the second degree, where a dwelling house is not involved. The law of Alaska provides that any person who wilfully and maliciously sets fire to or burns, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, which is not a dwelling house as defined herein, shall be guilty of arson in the second degree.

If you find from the evidence beyond a reasonable doubt that the Government has established each and every element of the crime charged in Count No. 1 of the Indictment, except that the building was at the time of the fire intended to be occupied in whole or in part as a dwelling house, or have a reasonable doubt as to whether such element has been proven, you should find the defendant not guilty of arson in the first degree, but you

may find the defendant guilty of arson in the second degree.

If, however, you find that the Government has not proven the other necessary elements of arson in either degree or have a reasonable doubt thereof, you should find the defendant not guilty of the crime of arson in either the first or second degree.

You are further instructed that the mere proof of the burning of a building is not enough to establish the crime of arson, and that in accordance with the presumption of innocence the law presumes a fire to have been accidental and not of criminal design, and that before you can find the defendant guilty of arson in either degree the prosecution must overcome such presumption by competent evidence beyond a reasonable doubt that such burning was wilful and malicious.

No. 4

The crime of burning property with intent to defraud the insurer, as charged in Count No. 2 of the Indictment, is defined by Alaska law as follows:

"Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who aids, counsels or procures the burning of any building, structure or personal property of whatsoever class or character whether the property of himself or of another, which shall at the time be insured by any person, company or corporation against loss or damage by fire, * * *" shall be punished accordingly.

In order to establish this crime charged, it is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully set fire to the building described with a fraudulent intent and purpose to collect insurance money. The terms "wilfully" and "burning" have been defined.

The essential elements of this crime as charged in said Count which the Government must prove beyond a reasonable doubt are, therefore, as follows: (1) that on or about the date charged and at the place charged in the Indictment the defendant caused the building described therein to be burned, as such term is defined herein; (2) that such act was done by him wilfully; (3) that said building was at the time of such fire insured by him against loss or damage by fire; and (4) that such act was done by him with intent to injure and defraud the insurer by wrongfully claiming or collecting insurance loss.

No. 5

Intent may be proved by direct evidence such as any declarations or admissions of the accused, or by indirect evidence, as where facts and circumstances are such as to warrant the inference of intent. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness to the state of mind with which the acts of a person were done. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. It is reasonable to infer

that a person ordinarily intends the natural and probable consequences or results of acts knowingly done by him.

In determining the issue as to intent, the jury are entitled to consider any statements made or acts done by the accused, and all facts and circumstances in evidence which may aid in the determination of such state of mind.

No. 6

The indictment in this case, as in all cases, is merely the formal accusation presented against the defendant by the grand jury. You can indulge in no presumption against him simply by reason of the fact that he has been indicted, because an indictment is no evidence of guilt.

The law presumes every person charged with a crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and must be given effect by you unless and until, by the evidence introduced before you, you are convinced that the defendant is guilty beyond a reasonable doubt.

The evidence in a criminal case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated to by the parties, and all applicable inferences and presumptions referred to in these instructions.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proven.

A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome by evidence to the contrary.

No. 7

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the evidence, or from the lack of evidence. It is rarely possible to prove anything to an absolute certainty. By "reasonable doubt" is not meant any vague or possible doubt, or one which may be created out of sympathy for the accused or the bare possibility of innocence, or a desire to escape from an unpleasant duty, but is such a doubt as would cause reasonable men to hesitate to act upon in matters of importance in their own affairs.

If, after examining carefully all of the facts and circumstances of the case, considering the law as stated by the Court, you have a settled and abiding conviction of the guilt of the defendant, amounting to a moral certainty, then you are satisfied of guilt beyond a reasonable doubt.

No. 8

All questions of law, including the admissibility of testimony, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court. Since the law places upon the Court the duty of deciding what testimony may

be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

It is the exclusive province of the jury to determine the facts in the case, applying the law thereto as declared to you by the Court in these instructions; and all questions of fact, as disclosed by the evidence admitted before you and the legal presumptions arising therefrom, must be decided by the jury, and all evidence addressed to them. Therefore the greater responsibility in the trial of this case rests upon you, as the triers of the facts.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

No. 9

A witness may be impeached or discredited by contradictory evidence; or by evidence that at other

times the witness has made statements which are inconsistent with the witness's present testimony;

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.

No. 10

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An expert witness is an exception to this rule. A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

No. 11

You are instructed that the defendant is entitled to take the stand as a witness in his own behalf, but he need not do so, and his failure to take the stand as a witness in his own behalf and his waiver

of that right, shall not create any prejudice against him in the minds of the jury.

No. 12

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

No. 13

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with

discretion and in obedience to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

Evidence is to be estimated not only by its own weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

Oral admissions of a defendant should be viewed with caution.

No. 13-A

In arriving at a verdict in this case, the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the court and must not in any way affect your decision as to the innocence or guilt of the defendant.

No. 14

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the

arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded.

No. 15

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual consciences, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

No. 16

You are to consider these instructions as a whole.

It is impossible to cover the entire case with a single instruction, and therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

Finally, while you are not justified in departing from the evidence or the rules of law as stated by the Court, you may, in determining any question applying to the facts of this case, resort to the common sense and experience in the affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

No. 17

Upon retiring to your jury room you will select one of your number foreman who will speak for you and sign the verdicts unanimously agreed upon.

You will take with you to the jury room these instructions together with the exhibits and five forms of verdicts. The first three relate to the first count and numbers four and five to the second count of the Indictment. If you find the defendant guilty of the crime of arson in the first degree as

charged in Count No. 1 of the Indictment, you will have your foreman date and sign verdict No. 1; if you find the defendant not guilty of the crime of arson in the first degree but guilty of the crime of arson in the second degree, you will have your foreman date and sign verdict No. 2; if you find the defendant not guilty of arson in either the first or second degrees, you will have your foreman date and sign verdict No. 3. If you find the defendant guilty of the crime of burning property with intent to defraud the insurer as charged in Count No. 2 of the Indictment, you will have your foreman date and sign verdict No. 4. If you find the defendant not guilty of such charge, you will have your foreman date and sign verdict No. 5.

If you agree upon your verdicts during court hours, that is, between 9 a.m. and 5 p.m., you should have your foreman date and sign them and then return them immediately into open court in the presence of the entire jury, together with the exhibits and these instructions. If, however, you do not agree upon such verdicts during court hours, the verdicts, after being similarly dated and signed, may be sealed in the envelope accompanying these instructions. The foreman will then keep them in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m., when the verdicts will be received from you in the usual way. In the event that you use this method of sealed verdicts, you are admonished not to make any disclosure concerning the verdicts to

anyone, and not to speak with anyone concerning the case until the verdicts have been returned in open court.

Dated at Nome, Alaska, this 29th day of April, 1958.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

ADDITIONAL INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

The situation is this: this, as you can readily see, is an important case. It has taken seven days of trial. In all probability it cannot be tried better or more exhaustively than it has on each side. You must take into consideration that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be chosen, and there is no reason to believe that the case will eventually be submitted to a jury which is more intelligent, more impartial or more competent to decide it. In fact it has been my impression that this jury represents as intelligent and as capable a cross-section of this District as it is possible to achieve. We must also bear in mind that any future trial,—in any future trial, it appears doubtful whether any more clear evidence will be produced on one side or the

other, because the case has apparently been very exhaustively tried on both sides. It appears that everyone who had any connection with or knew anything of this fire has been summoned here as a witness.

In conferring together you ought to pay proper respect to each other's opinions as stated in my original instructions. And while no juror should yield a sincere conclusion founded upon the law and the evidence of the case in order to agree with other jurors, and while the Court does not want any juror to surrender his or her convictions, unless honestly convinced that his convictions are erroneous, and although the verdict to which a juror agrees must, of course, be his or her own verdict and not a mere acquiescence in the convictions of other jurors with which he does not agree, yet it is necessary that the jury further deliberate in an effort, in a spirit of fairness and candor, to arrive at a unanimous result, because the law contemplates that the verdict of a jury should be the result of concurrence of twelve men and women.

Jurors have frequently disagreed and history shows us that with further deliberation those differences of opinion can or may be fairly worked out if each juror will, in fairness and candor to the opinions of other jurors, go over the evidence again and in the light of the law as given you in the instructions of the Court examine each of these questions submitted to you more exhaustively and in the light of such fairness and candor and deference to the opinions of others.

There is another feature here which is bad, which is that this case has apparently been talked about a great deal over town. It would be most difficult to obtain another jury who would be more fair and less influenced by gossip or opinion in the community than this jury is.

I therefore must urge that you again retire and consider all of the evidence in the light of the Court's instructions, and continue your deliberations in an effort to reach a unanimous verdict and report at such later time as may appear desirable.

A copy of these additional instructions will be sent in to you as soon as they are prepared by the reporter, so that you must retire and continue deliberations at this time.

Dated at Nome, Alaska, this 30th day of April, 1958.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

VERDICT NO. 2

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, guilty of the crime of arson in the second degree, as included in the offense charged in Count No. 1 of the Indictment.

Dated at Nome, Alaska, this 1st day of May, 1958.

/s/ WILLIAM BROWN,
Foreman.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

VERDICT NO. 5

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, not guilty of the crime of burning property with intent to defraud the insurer, as charged in Count No. 2 of the Indictment.

Dated at Nome, Alaska, this 1st day of May, 1958.

/s/ WILLIAM BROWN,
Foreman.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

VERDICT NO. 1

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, guilty of the crime of arson in the first degree, as charged in Count No. 1 of the Indictment.

Dated at Nome, Alaska, this .... day of ......, 1958.

......................,
Foreman.

[Title of District Court and Cause.]

VERDICT NO. 3

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, not guilty of the crime of arson in either the first or second degree.

Dated at Nome, Alaska, this .... day of ......, 1958.

......................,
Foreman.

[Title of District Court and Cause.]

VERDICT NO. 4

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, guilty of the crime of burning property with intent to defraud the insurer, as charged in Count No. 2 of the Indictment.

Dated at Nome, Alaska, this .... day of ......, 1958.

......................,
Foreman.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT AND, IN THE ALTERNATIVE, FOR A NEW TRIAL

Defendant moves the court to set aside the verdict of guilty returned in the above-entitled action on May 1st, 1958, and to enter judgment of acquittal in accordance with the motion made by the defendant at the close of all the evidence herein. In the alternative, defendant moves the court to set aside the verdict and grant him a new trial for the following reasons:

1.

The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2.

The verdict is contrary to the weight of the evidence.

3.

The verdict is not supported by substantial evidence.

4.

Court erred in refusing to require prosecution to elect upon which count defendant be prosecuted.

5.

Court erred in overruling defendant's motion to dismiss Count II upon the grounds it failed to allege facts sufficient to constitute a crime.

6.

Court erred in overruling defendants motion for judgment of acquittal on both counts of the indictment made at the close of the prosecution's case; and, at the close of all the evidence.

7.

On the grounds of newly discovered evidence which:

(a) Was discovered since the trial; (b) That the testimony was material to establish an alibi for the defendant but the witness could not be located prior to or during the trial, although subpoena had been issued and placed in the hands of the U. S. Marshal; (c) The testimony is not cumulative or impeaching; and (d) it is material to the issues involved; and (e) it is of such a nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

8.

That the verdict was a compromise verdict coerced by the courts refusal to discharge the jury for thirty one hours after the jury had been out sixteen hours and had reported to the court after 16 hours that the jury was deadlocked and could not agree.

9.

Misconduct on the part of the bailiff in securing a dictionary for the jury without the consent of the court. That evidently the dictionary contributed greatly to the arrival at a verdict for within forty

minutes after securing the said dictionary the jury arrived at a verdict.

10.

That the verdict is erroneous for the reason that the crime of arson in second degree is not an included crime in arson in the first degree; and for the reason that when the jury found the defendant not guilty of the crime of arson in the first degree and not guilty of burning with the intent to defraud insurer, they in effect found that there was no malice intent or motive involved.

11.

The court erred in not setting out in the instructions a definition of the crime of arson in the second degree.

12.

The verdict is inconsistent in that there were two offenses growing out of the same transaction, and one offense includes elements or acts necessary to the commission of the other offense, a verdict of acquittal of one is inconsistent with a verdict of guilty on the other.

Dated this 5th day of May, 1958.

TAYLOR & TAYLOR,
FRED D. CRANE,
Attorneys for Defendant.

/s/ By FRED D. CRANE,
Of Counsel.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

United States of America,
Territory of Alaska—ss.

Warren A. Taylor, being first duly sworn upon his oath, deposes and says: That at about 3 o'clock P.M. on the 1st day of May, 1958, affiant was in the United States Court House at Nome, Alaska, and that about that time he saw W. W. Laws, the bailiff of the Jury in the above entitled cause, leave the Court Room adjacent to the Jury Room and go to the Office of the United States Commissioner located on the ground floor of the said Court House.

That he emerged therefrom within a minute with a large Black Book and went to the door of the Jury Room and handed to one of the jurors the said book who thereupon returned to the Jury Room.

The affiant believes that the said book was a dictionary, as he was told so by the bailiff.

That the use of said dictionary without the permission of the Court constitutes misconduct as the Court must instruct the jury upon the definition of words and phrases and all other matters upon which the jury requires enlightenment. Affiant believes that the said book was instrumental in causing the jury to arrive at a verdict, as, within one half hour after getting said book they arrived at a verdict.

/s/ WARREN A. TAYLOR.

Subscribed and sworn to before me this 1st day of May, 1958.

[Seal] /s/ FRED D. CRANE,
Notary Public in and for the Territory of Alaska.
My commission expires 10/15/60.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

MEMORANDUM

Answer to Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict and, in the Alternative for a New Trial.

Defendant has claimed twelve reasons in support of his motion. Numbers 1, 2, 3, 4, 5, and 6 were previously urged during and at the close of the trial and will not be covered in detail in this memorandum as they have been fully covered before. The other six grounds will be answered fully below.

I.

Defendant's first argument in his brief is concerned with numbers 10 and 12 in that the crime of arson in the second degree is not included in a charge of arson in the first degree and that a verdict of not guilty would necessarily preclude of verdict of guilty on the other as the crimes grow out of the same transaction.

Statutes involved in a discussion of this matter are as follows:

Section 66-12-9 ACLA 1949. Conviction or ac-

quittal of crime consisting of different degrees. That when the defendant shall have been convicted or acquitted upon the indictment for a crime consisting of different degrees, such conviction or acquittal is a bar to another indictment for the crime charged in the former, or for any inferior degree of that crime, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment, as provided in sections 66-13-56 and 66-13-57. (CLA 1913, Sec. 2216; CLA 1933, Sec. 5286.)

Section 66-13-73. Conviction of degree inferior to charge or of attempt. That upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof. (CLA 1913, Sec. 2268; CLA 1933, Sec. 5362.)

Section 66-13-74. Conviction of included crime or attempt. That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment or of an attempt to commit such crime. (CLA 1913, Sec. 2269; CLA 1933, Sec. 5363.)

Section 66-13-75. Effect of doubt as to degree of crime. That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of

those degrees only. (CLA 1913, Sec. 2252; CLA 1933, Sec. 5342.)

Section 66-13-74 ACLA 1949 is virtually the same as Federal Rule 31 (c), Federal Rules of Criminal Procedure. (Barbeau vs. United States 193 F 2d 945, 9th Cir.) None of the other Federal Rules seem to be inconsistent with the other statutes quoted above.

Section 66-12-9 ACLA 1949 would indicate that when a person is indicted for an offense consisting of one or more degrees, the issue of guilt as to lesser degree must be submitted at the trial of the more serious degree of the crime, as an acquittal of a more serious degree is an acquittal of all lesser degrees of the offense. This rule indicates that a charge to the jury of the lesser degree of the offense would be proper wherever the evidence indicates such an offense is present. The rule would certainly make it impossible to have two trials, one for each degree of a particular crime. The issue of guilt as to any degree of the crime must be determined at one trial.

Section 66-13-73 ACLA 1949 certainly indicates that in crimes consisting of degrees the jury may make of a finding as to any degree of the offense. This statute specifically concerns crimes which are broken in to degrees as distinguished from types of crimes for which there may be lesser crimes of the same general nature. In the present case arson is broken into four degrees by statutes. This section of the code necessarily applies wherever the evidence warrants its application.

Section 66-13-74 ACLA 1949 deals with necessarily included crimes as distinguished from inferior degrees of the same crime. By its construction any crime necessarily included in that under the indictment are considered to be included in the indictment. It is the government's contention that the present case falls under Section 66-13-73 ACLA 1949 and also under Section 66-13-74 ACLA 1949 if second degree arson is considered a separate crime from arson in the first degree.

Section 66-13-75 ACLA 1949 virtually makes it mandatory to include the offense of second degree arson as a large part of the defense was to throw doubt as to the degree of the crime committed. Even without the other statutes above, this rule would require submission of the charge of second degree arson to the jury.

At page one of his brief defendant cites Giles v. United States 144 F. 2d, 860 as authority that the lesser included offense must "necessarily" be included in the greater. The Giles case concerned a conviction for negligent pointing of firearms where the indictment was for negligent homicide. This case is distinguished from the present case for two reasons; 1—the conviction was not for an inferior degree of an offense consisting of more than one degree. 2—even as a lesser offense the negligent pointing of firearms had one element not included in negligent homicide, namely, an intentional pointing of the firearm. In the present case there is no element in arson in the second degree which is not included in arson in the first degree. A dwelling

house is necessarily a building, although a building is not necessarily a dwelling house. Thus a person charged with arson of a dwelling is necessarily charged with arson of a building. The character of the structure is the only difference between the two degrees although both degrees do include a building, the second degree being less particular about the character of the building. The Giles case does not, therefore, present a true example of the case in point. The dicta in the Giles case actually supports the government's contention in the present case. The present case does meet the test required in the Giles case although it is not really necessary that it do so because we are dealing with one crime consisting of more than one degree as distinguished from two crimes, one of which might be included in the other.

A case more in point is United States vs. Barbeau (92 F. Supp. 196), and Barbeau vs. United States (193 F 2d 945) a Ninth Circuit decision based on an Alaskan case decided by Judge Dimond of the 3rd Division. In that case the court held that a person indicted for first degree homicide could be convicted of negligent homicide. The court held; 1—the gravamen of first degree homicide was the same as that for negligent homicide although one required a deliberate killing and the other only a negligent accident, and 2—that the indictment for first degree homicide put the defendant on notice that he would be convicted of negligent homicide.

In this case the circuit court also pointed out at p. 948 that since the whole defense had been one of negligent homicide that it was too late to claim

error in allowing a conviction on that charge. The court also distinguished Giles v. United States supra from the case under decision. It is submitted that Barbeau vs. United States is on all fours with the present case.

II.

The next specification made by defendant concerns an alleged inconsistency of the Verdict.

As a general rule an inconsistent verdict is not considered an error in the trial. Examples of this proposition are numerous.

In Dunn v. United States (284 U.S. 390), a case where a corporation and a corporate official had each been accused of a crime because of an act committed by the official while acting as an official and where the corporation was found not guilty and the official guilty, the court said:

"Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer * * *
Juries may indulge in precisely such motives or vagaries."

(See also United States vs. Dotterweich 320 U.S. 277 at 279.)

A very recent case in point is Green vs. United States, 355 U.S. 184. In that case the defendant was indicted for arson and first degree homicide under the felony murder rule. He was convicted of arson and second degree murder. Since he was charged

under the felony murder rule, the verdict as to second degree homicide was inconsistent. The Supreme Court reversed the case but sent it back for a new trial for the crime of second degree homicide and held that the man could not be retried for first degree homicide. The verdict of guilty as to the arson when a homicide was included is of course inconsistent with second degree homicide for if arson results in a death it should be first degree homicide.

Most of defendant's cases dealing with inconsistent verdicts do not concern verdicts dealing with different degrees of the same offense, but deal with charges where more than one crime was alleged to have been committed by a single act. In such cases it is of course true that if the overt act is not proven that the jury can not make a finding of guilty as to either count. For example in Rosenthal vs. United States, 276 Fed. 714 (9th Cir.), cited at page four of the brief, the defendant was charged with two counts relating to stolen property. In count one he was charged with buying and receiving stolen property with guilty knowledge and in count two of possessing the same property with guilty knowledge. Naturally if the jury, in such a case, could not find guilty knowledge it could not convict on either charge. In the present case the difference between the two counts was the character of the building. No other fact, other than the ultimate fact of guilt, was under dispute. A verdict of not guilty of one degree would not therefore preclude a verdict of guilty on the other degree and the jury could in no event find a verdict of guilty as to both degrees.

James vs. United States cited at page six of defendant's brief decided that burglary in a dwelling house did not include burglary not in a dwelling house. The court in deciding that case, however, noted other differences in the statute. Burglary not in a dwelling house requires proof that the building is used for the storage of property a separate element not required in the crime of burglary in a dwelling house. There again, the court was dealing with two separate statutes and not one statute consisting of several degrees. The requirement of notice of the nature of the charge is more strict in respect to a lesser included offense than it is for a lesser degree of the same offense. Barbeau vs. United States supra, which held that a charge of first degree homicide put the defendant on notice as to a possible conviction of negligent homicide, is controlling.

III.

In his eighth specification defendant charges that the court erred by its refusal to discharge the jury after sixteen hours when the foreman reported it was deadlocked.

It is submitted, first, that the jury never actually reported it was deadlocked. What the foreman reported was that the jury had been out all night and that there had been no change in the ballots since about midnight. The jury had adjourned to sleeping quarters at about 2:30 A.M. This is a far cry from a report of a deadlock.

No specific period of deliberation has ever been established and the court must determine when a

disagreement is sufficient to justify a discharge. Unless this discretion is greatly abused it will not be overruled. (15 American Juris Prudence "Criminal Law" Section 420 p 86.)

The matter of giving further charges to the jury after they have deliberated and have not come to an agreement is annotated quite fully at Title 18 U.S.C.A. under Rule 30 note 40. All the cases there cited are quite consistent with the charge made by the court in the present case. The instructions given are quite similar to those given in Wright vs. United States, 175 F 2d 384, cert. denied 70 S. Ct. 143, 338 U.S. 873.

As to the length of time a jury may be left out one Alaskan case which is quite similar is Shea vs. United States (C.C.A. Alaska, 260 F 807) in which the jury was out thirty hours after which it was urged to agree. Another federal case in point where a similar instruction was given after deliberation is United States vs. Samuel Dunkel and Co. (C.A.N.Y. 1949, 173 F 2d 506). In that case the decision below was reversed, but only because the judge inquired as to how the jury was divided. As long as the judge does not inquire into the state of the deliberations it does not seem to be error to call them in and carefully request them to try and reach an agreement. The usual charge, often called the "Allen Charge," is taken from Allen vs. United States (164 U.S. 492 at page 501). United States vs. Olweiss, 138 F 2d 798 is also in point. The Allen Charge seems to be satisfactory except when coupled with an inquiry into the division of the jury.

United States vs. Samuel Dunkel & Co. supra at 508. The leading 9th Circuit opinion in this subject is Quong Duck vs. United States (293 F 563), this was a reversal, but based partially on an inquiry as to the division of the jury. (See United States vs. Olweiss supra at 801). At page 801 of the Olweiss decision it is pointed out that the Supreme Court has never followed the Quong Duck decision.

IV.

The next specification of error claimed by defendant is that the bailiff violated the rule in respect to keeping the jury apart from others until it has reached its verdict. Defendant claims, and plaintiff concedes that the jury was allowed to have a dictionary before it had presented its verdict in open court. Plaintiff does not concede that the jury had not reached a verdict at the time it received the dictionary.

As a first defense to this contention plaintiff urges that it is now too late to claim error in this respect as an objection should have been raised before the verdict was received in open court. Defendant's affidavit shows that they knew of the incident before the verdict was received and the jury discharged. When the defense knows of misconduct on the part of a juror it becomes his duty to report such misconduct or otherwise he is in no position to claim his rights were prejudiced. (Bowers vs. United States, 244 F 641.) This theory is discussed at length at 96 A.L.R. page 530 and annotated by numerous cases, all of which hold that misconduct

by anyone in connection with the jury after their retirement, although it be of a character which might vitiate their verdict if brought before the court by timely complaint, is not available after the return of the verdict as a grounds for a new trial, where the defense counsel knew of the error before the verdict.

In the present case defense counsel knew of the error, if any, before the verdict was received. No doubt the error, if any, could have been cured by an appropriate instruction.

As a second defense to this motion plaintiff contends that no possible prejudice to the defendant could have resulted from the reception of the dictionary by the jury. The rule that nothing should reach a jury which does not do so in court room, particularly after the jury has been locked up, is not an end in itself so that, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, a reversal is not required. (Federal Practice and Procedure, Barron, Section 2581 page 490, "Rule 52—Harmless Error and Plain Error," citing United States vs. Compagna, 146 F 2d 524, at 528 cert. den. 324 U.S. 867 [which cites 96 ALR 889.])

With this theory in mind plaintiff herewith submits affidavits of the bailiff and a juror which indicate that the lapse of seclusion of the jury did not in fact have a prejudicial effect on defendant's case. These affidavits show First; that the dictionary was received after the jury had finished its deliberations, Second; that the purpose for which the dic-

tionary was sought was to determine a definition for "fraud" and "defraud," words used in connection with count two of the indictment and not concerned with either arson in the first degree or arson in the second degree. Since defendant was acquitted on count two, it is impossible that the reception of the dictionary could have had a prejudicial effect to the defendant.

Other cases concerning this matter include the following:

United States vs. Sorcey, 151 F 2d 899 cert. den. 66 S. Ct. 821, 327 U.S. 794 (communication to juror considered presumptively prejudicial but presumption may be rebutted).

United States vs. Carruthers, 152 F 2d 512 cert. den. 66 S. Ct. 805; 327 U.S. 787 (juror read newspaper, but defendant had burden of showing a prejudice).

V.

As to the motion for a new trial generally:

The authority to grant a new trial should be exercised with caution and should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. (Federal Practice and Procedure, supra, Section 2281; citing United States vs. Robinson, 71 F Supp 9.)

The trial court's determination on conflicting evidence, on a motion for a new trial for newly discovered evidence, should remain undisturbed except for extraordinary circumstances, (Blodgett vs. United States, 161 F 2d 47, 8th Cir). Newly discov-

ered evidence must be of such a nature as to be admissible under the pleadings and must in fact be newly discovered since the former trial or else have been unknown at the previous trial (Wharton's Criminal Law, Vol 5 Chapter 92 p 347 et seq. Section 2169). Defendant has not shown or given any basis at all that he has in fact evidence of this nature to present at a new trial.

For a verdict to be considered contrary to the evidence it must be more than a verdict against *to* the preponderance of the evidence, there must be a preponderance of proof on the other side of the case. This is a matter largely within the discretion of the trial court. (Wharton's Criminal Procedure, supra, at Section 2166.) (Citing Dunlapp vs. United States, 43 F 2d 999, 9th Cir.)

If there is competent substantial evidence to support a verdict against the accused, viewing the evidence most favorable to the government, the conviction must be affirmed. (United States vs. Empire Packing Co., 174 F 2d 16, cert. den. 69 S. Ct. 1534, 3337 U.S. 959). The test is whether a reasonable mind can fairly conclude guilt beyond a reasonable doubt, (Curly vs. United States, 160 F 2d 229, cert. den. 67 S. Ct. 1511, 331 U.S. 837). The court should not determine the credibility of witnesses or the weight of the evidence. (United States vs. Toner, 77 F. Supp. 908, 173 F 2d 140.)

Respectfully submitted,

/s/ RUSSELL R. HERMANN,
United States Attorney.

Acknowledgment of Receipt of Copy Attached.

[Title of District Court and Cause.]

AFFIDAVIT OF W. W. LAWS

United States of America,
Territory of Alaska—ss.

I, W. W. Laws, being first duly sworn upon his oath, deposes and says: That I was the bailiff in the case of the United States of America vs. Natividad Salinas No. 1642 Criminal.

That on May 1, 1958 at about three o'clock P.M. William Brown, foreman, and Robert Schick, venireman, came out of the jury room where the jury had been deliberating and announced that the jury had reached a verdict.

That after receiving this information I went to the marshal's office and announced that the jury had reached a verdict and then went back to the private hallway leading to the jury room. That when I returned Mr. Schick asked for a dictionary and that I went to the United States Commissioner's Office and borrowed a dictionary which I took back and gave to Mr. Schick.

That when I returned with the dictionary Mr. Warren Taylor, attorney for defendant, was in the courtroom with the defendant, Natividad Salinas. That Mr. Taylor said, "What's that," and I said, "a dictionary, is there anything wrong with that," and that then he replied, "No, I guess not."

That shortly thereafter court was convened and the verdict was presented in court.

/s/ W. W. LAWS.

Subscribed and sworn to before me this 2nd day of June, 1958.

[Seal] /s/ BYRON G. REED,
Notary Public for Alaska. My Commission Expires 8/29/59.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT SCHICK

United States of America,
Territory of Alaska—ss.

I, Robert Schick, being first duly sworn and on oath, depose and say as follows:

That I was one of the members of the jury empanelled to try the case of United States of America vs. Natividad Salinas, No. 1642 Criminal.

That on May 1, 1958 at about three o'clock in the afternoon the jury reached a verdict which was signed and sealed and that shortly thereafter, and after the bailiff had been notified that we reached a verdict, one of the jurors inquired as to the meaning of "fraud" as distinguished from "defraud." As there was some disagreement as to this the foreman requested the bailiff to get a dictionary, which he did.

That shortly before the bailiff got the dictionary I saw one of the defense attorneys approaching the court house from the direction of Mr. Crane's office and that shortly after the dictionary arrived we went into the courtroom to present the verdict.

That at no time after the dictionary was received

did we continue our deliberations or in any way alter or reconsider our verdict.

/s/ ROBERT C. SCHICK.

Subscribed and sworn to before me this 4th day of June, 1958.

[Seal] /s/ GEORGE A. BAYER,
Notary Public for Alaska. My Commission Expires 9/14/58.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

RULING

Upon defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict and in the Alternative for a New Trial.

Be It Remembered that at 3:00 p.m. June 6, 1958, the above entitled matter came on regularly to be heard, counsel for plaintiff and defendant being present. Briefs having been submitted and comments of counsel heard, the Court ruled as follows:

The Court: Well, I have given considerable thought to the motion and the briefs, which I have carefully reviewed, and I am prepared to rule upon it.

In the first place, I find a mis-statement here in the first paragraph,—I don't know who prepared this, Mr. Taylor or Mr. Crane, — in which it is stated that the jury superimposed its own verdict

of arson in the second degree, as set forth in Sec. 65-5-2, ACLA, as amended by Ch. 141, SLA 1957. That is not true. The verdict returned on Count I of the indictment was specifically in accordance with the instructions of the Court; they did not superimpose their own verdict in any sense. During the progress of the trial there developed an issue raised by the defendant and consistently urged, that the property involved was not a dwelling house. I found that there was an issue of fact as to whether the previous occupancy of the rooms in the Kotzebue Grill had been abandoned in any previous use regarding dwelling purposes, and therefore found it necessary to submit that issue to the jury. And the jury were so instructed, and in the final instructions were particularly instructed that if they found the defendant not guilty of the crime of arson in the first degree, but guilty of the crime of arson in the second degree, they were to then return Verdict No. II, which is precisely what the jury did, having determined that issue against the Government and in favor of the defendant,—that the property involved was not, in the judgment of the jury, a dwelling house at the time of the fire. This verdict, then, was fully justified by the evidence.

The next point that defendant raises is that there was no pleading of the charge of arson in the second degree and that a verdict of guilty of such crime was speculative or invented by them, which again is wholly wrong.

Now with respect to the legal basis for both the instruction and the verdict, counsel base their con-

tention largely upon decisions of the appellate courts and the District Courts with respect to conviction of a lesser offense as included in a greater offense with which the defendant is charged. As correctly pointed out by the Government in its brief, the question of conviction of a lesser offense does not apply here. But it is a question of a conviction of a lesser degree of the offense charged, which is arson. Our Legislature saw fit to set up several degrees of arson. The evidence developed that there was an issue as to whether it was first or second degree. Sec. 66-13-73 of our Compiled Laws provides that upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto. Sec. 66-13-75 provides that when it appears that the defendant has committed a crime and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. Therefore it was mandatory upon the Court to submit the issue of lesser degree to the jury, and again the evidence justified their verdict.

Attention is also directed to the provisions of Sec. 66-12-9 of our Compiled Laws which provides that when a defendant is convicted or acquitted upon an indictment consisting of different degrees of a crime, such conviction or acquittal is a bar to another indictment for the crime charged, or any inferior degree of that crime.

Therefore, the instructions and the verdict come

clearly within the provisions of our Alaska Code of Procedure. Moreover, I am of the opinion that if the statute with relation to included offenses is instead applicable, that the verdict is likewise justified under the very rule cited by counsel,—I should say the test set forth in decisions cited by counsel,—and that is, to be included in the greater offense, the lesser offense must be such that it is impossible to commit the greater without first committing the lesser. That is certainly true here. It is impossible for the defendant to have committed the crime of arson of a dwelling house without first committing the crime of arson,—burning. So applying that test, if the statute were applicable, I still find that the verdict is entirely justified by the evidence. The situation is wholly different in the cases cited by counsel with which, of course, I am in accord, such as the conviction of assault and battery on a charge of kidnaping. The distinction is obvious. And these cases then are not applicable.

Turning then upon the point of inconsistent verdicts,—that is, it is contended that the verdict of guilty of arson in the second degree is inconsistent with the verdict of not guilty of burning with intent to defraud the insurer. If we go through the evidence, there certainly can be no such inconsistency. They are separate crimes; they involve separate elements. The issue was certainly raised all through the trial and extensively argued to the jury by counsel for the defendant that this defendant could not be guilty of the crime of burning with intent to defraud the insurer because he never made a claim

of loss. The jury obviously were convinced by that argument that the defendant could not be convicted of intent to defraud the insurer where he never claimed any insurance loss. So it was counsel who raised that issue and it was the jury who determined it in favor of the defendant. Therefore I can find no inconsistency in such verdicts. And again the authorities cited by counsel with respect to inconsistent verdicts are certainly not applicable here, for after all, the matter of consistent or inconsistent verdicts depends upon the evidence and the issues raised, because here the same facts were not relied upon by the Government to sustain a conviction in both counts. Other facts to sustain the verdict on the second count were necessary to be shown.

With respect to the dictionary incident, counsel has already stated that he would not urge it in view of the showing made that the dictionary was sent in by the bailiff at the request of one of the jurors after the jury had already arrived at their verdict, and further for the reason that the dictionary was requested to explain to some of the Eskimo jurors the difference between fraud and defraud, which related only to the second count, as to which the defendant was acquitted. In any event the sending in of a dictionary is not a communication contemplated by the statute which may not be permitted to go to a jury, and it is not in any sense an outside influence or any document sent in to influence the jury in arriving at their verdict, and therefore cannot be prejudicial error in any event, unless there be some showing made that the jury used the dic-

tionary to contradict instructions of the court as to legal terms, which does not appear here.

With relation to the sufficiency of the evidence, of course the trial judge is not the judge of the weight or the sufficiency of the evidence. That is a matter for the jury, but the verdict must be sustained if there was evidence upon which a reasonable mind might fairly conclude the guilt of the accused beyond a reasonable doubt. And I find that there certainly was such evidence. I find then, no error in denying the defendant's motion for acquittal at the conclusion of the evidence because there was substantial evidence to go to the jury.

The matter of election upon counts had already been determined by the Court and I adhere to the same ruling.

The same as to defendant's motion to dismiss Count II; and the same as to the Court's order in denying the motion for judgment of acquittal at the close of the Government's case, as to which I find no error.

I cannot quite understand the theory of counsel, which is not urged here, however, of newly discovered evidence.

Mr. Crane: If I might, your Honor, I might clear that up in about two words.

The Court: Yes.

Mr. Crane: I put that in in the hope I would be able to locate Mr. Amundsen and another witness, and I have never been able to contact him. I thought at the time I put that in I would probably have an opportunity to talk to the man, and

find out if he had any evidence that would come under the class of newly discovered evidence, and it is for that reason that it is in there. And had I been able to talk to Mr. Amundsen and had there been anything there, I would now urge it before the Court.

The Court: Well any such evidence would relate to the testimony of Mrs. Salinas in establishing an alibi, would it not?

Mr. Crane: Yes, your Honor, in corroborating it.

The Court: Apparently there is no such new evidence which could have any such effect, and the issue of credibility of Mrs. Salinas' testimony seeking to clear the defendant was certainly very fully argued when submitted to the jury.

The matter of coercion was apparently not urged and I find none. The additional instruction given to the jury has been approved in substance by our own Circuit Court and I think even by the Supreme Court.

Mr. Hermann: It is called the Allen charge, I think.

The Court: Yes, that is what it has been referred to. And the jury in reporting here at 9:30 a.m. in the morning did not actually state it was deadlocked and there was no hope of agreement. They merely said they stood in the same place as they stood at midnight, and this was 9:30 a.m. Meanwhile they had been put to bed; so there was no coercion.

No. 10 we have passed upon.

No. 11 states that the Court erred in not setting

out an instruction on a definition of the crime of arson in the second degree. I think that is error because we certainly did so instruct the jury, in the exact language of the statute, by Instruction No. 3-A.

I find then no merit in any of the grounds upon which the defendant has moved for either judgment notwithstanding the verdict or in the alternative a new trial. I believe the case was fairly tried and the issues thoroughly explored and submitted to the jury. Therefore, the motion will be denied.

We will need to set time for sentence. I presume the defendant is at Kotzebue.

Mr. Crane: Yes. There is a new schedule out now and I can't seem to find out anything from Wien's. The planes go to Kotzebue every day but I can't seem to find out when anything comes back.

The Court: We should allow five days anyhow.

Mr. Crane: I will call him on the phone immediately.

The Court: Five days takes us to the 11th. I can be here at 1:30. I imagine that would be convenient.

(Court thereupon fixed time for sentence at 1:30 p.m., June 11, and advised Mr. Crane that under Rule 33, Federal Rules of Criminal Procedure, newly discovered evidence could be presented before or within two years after final judgment, after which court was recessed until 3:00 p.m.)

[Endorsed]: Filed October 24, 1958.

United States District Court For The District of Alaska, Second Division

No. 1642 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIVIDAD SALINAS, Defendant.

JUDGMENT AND COMMITMENT

On this 27th day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Arson in the Second Degree as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years and that he pay a fine of Five Hundred ($500.00) Dollars and that he stand committed for said sentence and until said fine is paid or he is otherwise discharged according to law.

It Is Adjudged that the execution under this sentence is suspended for ten days pending notice of appeal, and that the bail bond on appeal is fixed at $5,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WALTER H. HODGE,
United States District Judge.

Recorded in Orders and Judgment, Vol. 14, Page 1027.

[Endorsed]: Filed June 27, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Natividad Salinas, Kotzebue, Alaska.

Name and address of Appellant's Attorney: Fred D. Crane, Nome, Alaska, Taylor and Taylor, Fairbanks, Alaska.

Offense: Violation of Chapter 141 SLA 1957 (Sections 65-5-1 and 6 ACLA 1949 as Amended).

Concise statement of judgment or order:

"On this 27th day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been con-

victed upon his plea of not guilty and a verdict of guilty of the offense of Arson in the Second Degree.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years and that he pay a fine of Five Hundred ($500.00) Dollars and that he stand committed for said sentence and until said fine is paid or he is otherwise discharged according to law."

Name and address of institution where now confined, if not on bail:

Defendant is now out on bail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: ....

/s/ FRED D. CRANE,
Of Counsel for Defendant.

[Endorsed]: Filed July 1, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To J. M. Kroninger, Clerk of the above entitled Court.

You will please forward to the circuit court of appeals for the Ninth Circuit, copies of all papers in the above entitled case, which includes.

Indictment.

All Written Motions.

Verdict of the Jury.

Motion for a Verdict of Acquittal or in the Alternative, for a New Trial.

Instruction given by the Court to the Jury.

All written Exhibits.

TAYLOR AND TAYLOR,
FRED D. CRANE,
Attorneys for Defendant and Appellant.

/s/ By FRED D. CRANE,
Of Counsel.

[Endorsed]: Filed October 15, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD ON APPEAL

To: J. M. Kroninger, Clerk of the above-entitled Court.

You will please forward to the Circuit Court of Appeals for the Ninth Circuit, copies of all papers in the above entitled case, which includes:

All decisions of the Court given on written motions.

All verdicts returned by the jury.

All verdicts submitted to the jury.

Plaintiff's memorandum and accompanying affidavits in answer to defendant's motion for a verdict of acquittal or in the alternative for a new trial.

The Court's decision on Plaintiff's motion for a

verdict of acquittal or in the alternative for a new trial.

/s/ RUSSELL R. HERMANN,
United States Attorney.

[Endorsed]: Filed October 22, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
Second Division—ss.

I, J. M. Kroninger, Clerk of the United States District Court for the District of Alaska, Second Division, do hereby certify that the foregoing contains the following original papers requested in the Appellant's designation of record on appeal and the Appellee's designation of additional portions of the record on appeal:

1. Indictment.

2. All written exhibits consisting of Plaintiff's exhibits F, N, O, P, Q, R, S, T, U, V, W, X, Y, Z and AA, Defendant's exhibits 10 and 13.

3. Court's Instructions to the jury.

4. Court's additional instructions to the jury.

5. Verdict No. 2 returned by jury of guilty to the crime of arson second degree.

6. Verdict No. 5 returned by jury of not guilty of burning property with intent to defraud insurer.

7. Verdict form No. 1, 3 and 4 submitted to jury.

8. Defendant's motion for judgment of acquittal notwithstanding the verdict and in the alternative, for a new trial with affidavit of Warren A. Taylor attached.

9. Memorandum answer to defendant's motion for judgment of acquittal with affidavits of W. W. Laws and Robert C. Schick attached.

10. Transcript of Court's decision on motion for judgment of acquittal (file copy).

11. Judgment and Commitment.

12. Notice of appeal.

13. Appellant's designation of record on appeal.

14. Plaintiff's designation of additional portions of the record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 24th day of October, A.D., 1958.

[Seal] /s/ J. M. KRONINGER,
Clerk.

In The District Court For The District of Alaska, Second Judicial Division

No. 1642

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATIVIDAD SALINAS, Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Walter H. Hodge, District Judge, and a jury.

Appearances: Hon. Russell R. Hermann, United States Attorney, Nome, Alaska, for plaintiff. Mr. Warren A. Taylor, Fairbanks, Alaska, and Mr. Fred D. Crane, Nome, Alaska, for defendant.

Dates: April 21, 22, 23, 24, 25, 28, 29, and 30, 1958.

Place: Nome, Alaska. [1]*

Be It Remembered that at 10:00 a.m. on April 21, 1958, the above entitled cause came on regularly to be heard. The defendant was personally present in court and represented by counsel Mr. Crane; the plaintiff was represented by Hon. Russell R. Hermann, United States Attorney; the Honorable Walter H. Hodge presiding.

The Court: Are the parties ready to proceed?

Mr. Crane: If your Honor please, we are ready to proceed except at this time I have a waiver by the defendant which I submit to the District Attorney for his consent, in which we desire to waive a jury and try this case before the Court.

Mr. Hermann: The Government will not consent.

Mr. Crane: Your Honor, if that is the case, I would hand the waiver to the Court and ask that it be filed. May I approach the bench? I think it is in due form.

The Court: Well, it strikes me that the waiver may not be accepted unless both parties consent. Isn't that true?

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* Page numbers appearing at bottom of page of Reporter's Transcript of Proceedings.

Mr. Crane: That's the rule, but I still wish to present it and have it made a matter of record, if I may.

The Court: Very well. Inasmuch as the Government does not consent, the waiver of trial by jury will at this time be denied. Is the Government ready?

Mr. Hermann: The Government is ready, your Honor.

The Court: We will proceed then to empanel a jury in this case.

Mr. Crane: If I might remark, if I may, before the jury is called. I am not alone in this case. Mr. Warren A. Taylor is [13] associated with me and he will join me as soon as the plane arrives. In the meanwhile I will carry on naturally; but just so the jury will know there is co-counsel in the case.

The Court: I should have added to my introductory statement that the Government is represented by Mr. Russell R. Hermann and the defendant by Fred D. Crane and also by Warren A. Taylor of Fairbanks, who will be here, who is expected later this morning.

Mr. Crane: I understand the plane will be in about 10:30.

The Court: We will proceed then to empanel a jury in this case.

(A jury was duly empaneled and sworn) (Mr. Warren A. Taylor appeared in court at 2:00 p.m.)

(At 3:50 p.m. the jury was duly admonished and court adjourned until 10:00 a.m. the following day.)

Be It Remembered that at 10:00 a.m., April 22, 1958, court reconvened and the trial of this cause was resumed. Defendant was personally present and represented by counsel Mr. Crane and Mr. Taylor; the Honorable Walter H. Hodge presiding.

The Court: We will proceed this morning with the case of United States vs. Salinas, the defendant being present with counsel. Will you call the roll please.

(The jury roll was called and all members were present) [14]

(Mr. Herman presented an opening statement on behalf of the plaintiff.)

Mr. Crane: We will reserve our opening statement, your Honor, until after the Government's evidence is in, prior to our defense.

The Court: Very well. The Government may call its first witness.

JOSEPH BRANTLEY

was then called as the first witness for the plaintiff and, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Will you state your name, please. Tell the Court and jury your name.

A. Joseph E. Brantley.

(Testimony of Joseph Brantley.)

Q. Where do you reside, Mr. Brantley?

A. Kotzebue.

Q. How long have you lived at Kotzebue?

A. For two years.

Q. Do you know the defendant, Steve Salinas?

A. Yes, I do.

Q. By what name do you know him?

A. Steve Salinas.

Q. Do you know of any other name he uses?

A. Well, I have heard his other name, but I can't say it.

Q. And how were you employed in Kotzebue in the month of December?

A. I was employed by Mr. Salinas as a dinner cook and maintenance man. [15]

Q. How long did you work for him? When did you start? A. December—November 17.

Q. Of '57? A. Yes.

Q. What were your duties on that job?

A. As dinner cook and maintenance man.

Q. Will you speak a little louder, please?

A. Dinner cook, and maintenance; and preparing brakfasts and dinners.

Q. What type of work did you do as maintenance man?

A. Just in the event that anything went wrong with the equipment that we had to work with.

Q. Were you working for him on December 25?

A. Yes, I was.

Q. What was the name of the business where you were working? A. Kotzebue Grill.

(Testimony of Joseph Brantley.)

Q. Where was this business located?

A. About the center of town on the beach front, located between the Postoffice and Ferguson's Mercantile Store.

Q. What type of building was it?

A. A two-story building. It was the long type building, no branching partitions or anything.

Q. What direction was the front of the building facing? A. West.

Q. How was the building facing in relation to Kotzebue Sound?

A. The front of the building was facing the water. [16]

Q. How far from the water was the building?

A. Thirty to forty feet.

Q. I see. What would occupy the bottom floor of this building?

A. Well, the dining room or restaurant part, and kitchen; and there was a deep-freeze and cooler.

Q. What occupied the upper story of the building?

A. It was used mostly for storage and washing of clothes, and Mr. Salinas had a room there. There was another fellow previously employed there that had a room——

Mr. Taylor: Just a moment, your Honor; I am going to object to the volunteered statement of what somebody previously had.

The Court: I cannot see anything prejudicial in it.

Mr. Taylor: It certainly is prejudicial and is not

(Testimony of Joseph Brantley.)
responsive to the question, a volunteered statement not responsive to the question.

The Court: It has been held that the party asking the question may make such an objection, not the adversary. However, it probably is prejudicial here and may be stricken.

Q. (By Mr. Hermann): What type of rooms were upstairs?

A. Well, there is a front room.

Q. What kind of a room was that?

A. A large room. I couldn't tell you the dimensions or size.

Q. How was it furnished?

A. Well it had a washing machine and, you know, spices, jam, canned [17] good, that we used in the restaurant.

Q. What was the room next to that? What kind of a room was that?

A. From that room you went into a hallway; then you had rooms on each side of the hallway.

Q. What kind of rooms?

A. On the right, going east, we had a room which Mr. Salinas used to live in at times, and that was on the right; and then on the left there was a room that was a bedroom; and then you go a little further back and there is another room that wasn't being used; it was on the right-hand side. Then there was a little shelf space off, just a small hallway, from there, where they stored their canned goods.

Q. Would you speak a little louder, please? What was the room next to that?

(Testimony of Joseph Brantley.)

A. Then you get into a back room that had beds and things like that in there not being used, and that was just dead storage in it, in the back.

Q. How was the room that Mr. Salinas sometimes used furnished? How was that furnished?

A. It had a bed——

Mr. Crane: I object to that, your Honor, as assuming a state of fact not in evidence. It is leading and suggestive—"sometimes used".

The Court: He was asked to describe the use; well, he may do so. Objection overruled.

Mr. Crane: I am not objecting to describing the room, but as to who used it. He was asked a question as to who "sometimes used" it. [18]

The Court: Will the Reporter read the question, please.

(The reporter then reads the previous question as follows: "How was the room that Mr. Salinas sometimes used furnished? How was that furnished?")

The Court: Objection overruled. He may answer.

A. He had a bed; he rested on it at times. He had a couple of stands and things that a small hotel room would have, and other personal things and belongings that were in there.

Q. What personal things were there?

Mr. Crane: If the Court please, that's objected to unless the witness knows.

Q. (By Mr. Herman): What personal things were in there, if you know?

The Court: First, would you ask the witness if

(Testimony of Joseph Brantley.)
he knows what personal things were in the room. Then if he does know, you may ask him what things.

Q. (By Mr. Herman): Do you know what type of personal things were in the room?

A. Just some of them; I don't know everything he had in there.

Q. Describe the ones you know.

A. Well, he had his shaving articles and his other things that he used there. He had clothes.

Mr. Crane: I will ask to strike the "other things", your Honor. It's not responsive to the question, and is immaterial, irrelevant and incompetent saying "other things that he used". [19]

The Court: Objection overruled: He may answer.

Q. (By Mr. Hermann): What type of room was across the hall from that room?

A. The two rooms were almost the same in build, and had a bed and a little stand there and a clothes closet in there.

Q. Do you know whether or not there was anything in the clothes closet?

A. Yes. There was something in there; I couldn't say what. I know there were clothes in there of this fellow that previously worked there.

Q. What was the name of the fellow that previously worked there?

Mr. Taylor: Just a minute, your Honor. I believe that is incompetent, irrelevant and immaterial as to who previously worked there unless the time would be shown, not just whether or not somebody else worked in the place.

(Testimony of Joseph Brantley.)

The Court: Well the purpose of this examination, as I judge it to be, is to show whether or not this building was occupied as a dwelling house, and and that is essential.

Mr. Crane: At the time of the fire, your Honor.

The Court: Well, yes. But he may state whether it had been occupied as such previous to the fire, if there was a fire. You could fix the time probably a little better. A. Charlie Norton.

Q. (By Mr. Herman): Do you know where Charlie Norton was on the 25th of December?

A. I understand he was in the hospital in Anchorage.

Q. How long had he been gone, if you know?

A. I can't tell you that; how long he had been gone.

The Court: Well, now, counsel, you should show whether this condition that the witness now describes was the same on the 25th of December, 1957.

Q. (By Mr. Hermann): How were these rooms furnished on the 25th of December, 1957?

A. About the same as I told you.

Q. Do you know whether or not the Kotzebue Grill was open for business on the 25th of December? A. No, it wasn't.

Q. Were you at the Kotzebue Grill on the 25th of December? A. Yes. I was there.

Q. What time did you go there first?

A. Approximately 1 o'clock p.m.

Q. What did you do while you were there?

(Testimony of Joseph Brantley.)

A. I went through to check the fires, to see that they were burning properly and to fuel the stove in there, in Mr. Salinas' room, and have the room warm there.

Q. What parts of the building did you actually go into on that occasion?

A. I went through the whole building where there were stoves. Well, I went through the whole entire building except the cooler and deep freeze.

Mr. Crane: I didn't get that answer. What——

The Court: Cooler and deep freeze.

Q. (By Mr. Herman): What did you see in the back rear-most upstairs room at that time? [21]

A. It was just arranged the usual way, the way it usually is. Nothing unordinary.

Q. How long were you in the entire building on this occasion approximately?

A. Approximately twenty minutes.

Q. Where did you go from there?

A. I went next door to the Fergusons.

Q. Were you back in the Grill at any other time that day?

A. After fueling the stove in his room, I went back to check the fire to see if it was burning properly.

Q. About what time was that?

A. Approximately 3 or 4 o'clock.

Q. What rooms in the building did you enter at that time?

A. I checked all the stoves and went through the building the same as I did before.

(Testimony of Joseph Brantley.)

Q. Were you in the upstairs room, the rear-most room at that time?

Mr. Crane: What time was that?

Q. (By Mr. Hermann): Would you repeat the time, please? A. Approximately 4 o'clock.

Q. A.M. or P.M.? A. P.M.

Q. What did you see in the rear-most upstairs room at that time?

A. It was the same; it was in order, as I previously stated.

Q. How long were you in the building on this occasion?

A. About fifteen minutes the last time. [22]

Q. Where did you go from there?

A. Next door to the Fergusons.

Q. Were you in the Kotzebue Grill at all again on the 25th of December?

A. Yes. I made one more trip to the downstairs part. I didn't go into the upstairs part on my last trip.

Q. What was your purpose on that trip?

A. I was preparing a Christmas dinner for the Fergusons and I saw we would run short so I brought some chicken broth. I went in to obtain a little broth.

Q. On any of these three visits did you see anyone else in the building at all? A. No.

Mr. Crane: I didn't get the time of the third visit.

A. It was approximately an hour later or an hour and a half later.

(Testimony of Joseph Brantley.)

Q. (By Mr. Hermann): How long were you in the building on that occasion?

A. About three minutes.

Q. Did you, at any time, see anyone else in the building on those three occasions?

A. No, I did not.

Q. Do you know whether or not the building was locked on those three occasions when you went in?

A. Yes, it was locked.

Q. Do you know who had the keys to the lock?

A. Yes. [23]

Q. Who had the keys?

A. I had a set of keys for the downstairs part, and Mr. Salinas had a set of keys.

Q. Is it possible to go from the downstairs to the upstairs inside the building?

A. Yes. There is a key for the upstairs part that stays downstairs all the time, for use of the employees for going up and down to the bathroom.

Q. How does one get from the downstairs to the upstairs?

A. There is a stairway on the outside of the building. You have to go outside and enter through a side door on a platform.

Q. Well, how many keys are there to the downstairs, specifically.

A. Originally there were three sets of keys for the downstairs. One set was locked inside; the other set I had; and the other set Mr. Salinas had.

Q. How many sets of keys were there to the upstairs? A. Only two keys.

Q. Where were they?

(Testimony of Joseph Brantley.)

A. Mr. Salinas had one set of keys, and the other set was locked in the downstairs.

Q. Was it necessary then for you to go in the downstairs before you could go in the upstairs?

A. Yes, it was.

Q. Were you in that building any other time on the 25th of December?

A. Only when I was going to the fire, which was right at the turn-over of the 25th, approximately 11 to 11:15 p.m.

Q. When did you first hear of the fire?

A. It was about 11 o'clock. [24]

Q. How did you receive notice of the fire?

A. I had just come home from Fergusons. We ran a late movie, and I just entered my house, and a little girl by the name of Margie Lincoln came in, rushing in, and told me the restaurant was on fire.

Q. What did you do then?

A. I grabbed my jacket and headed for the restaurant.

Q. Would you describe what you did immediately after leaving the restaurant?

A. I could see from the outside smoke, and it was also coming out of the east end of the upstairs.

Q. The east end. What end is that in relation to the front of the building?

A. The building sets east and west, the beach running north and south almost.

Q. Would the east end be the rear end or the front end?

A. The east end would be the back end.

Q. What did you do after you saw this smoke?

(Testimony of Joseph Brantley.)

A. I entered the downstairs in order to get the key for the upstairs part.

Q. Do you know whether or not the downstairs door was locked?

A. Yes, it was locked; it was padlocked.

Q. How did you open it?

A. With my key.

Q. What did you do then?

A. I went into the downstairs part and got the key for the upstairs door. [25]

Q. Was there anyone with you, or were you alone at the time?

A. There was a lot of people around; I guess a couple did follow me into the downstairs—who, I couldn't say.

Q. What did you do after you removed the key?

A. Well, I got the key and went to the upstairs, and immediately to the scene of the fire and checked the rooms as I went down the hallway.

Q. How did you know where the scene of the fire was at that time?

A. Well, you could see it from the outside, and being downstairs there was no fire then. Going into the front end of the building, the front room part, you could see if there was a fire. As you go you could canvass the whole building in the matter of a minute.

Q. What did you see at the fire?

A. The first thing I saw was, I could see the fuses were all blown from shorting in the fire, causing the wires to short out. There were no lights, but

(Testimony of Joseph Brantley.)
the fire burning in the attic threw a light down into the room.

Q. What could you see in the room?

A. Well, I could see that the fire had been set for sure.

Mr. Crane: I object to that, that he "could see that the fire had been set * * *" It's improper; there is no evidence in this case that the fire had been set. It's a conclusion of the witness.

The Court: It's probably a conclusion. It wasn't responsive. He may describe what he saw, from which conclusions may be drawn.

Mr. Crane: At this time I am going to ask the Court to admonish this witness to not volunteer any more testimony.

The Court: Counsel has no right to instruct the witness; however, [26] it is proper to avoid volunteering information and answer only the questions which are put to you.

Q. (By Mr. Hermann): What did you see in that room, Mr. Brantley?

A. Underneath the attic, the hole that you go through into the attic, this chair was sitting directly underneath. There was a case or two of Sunnyboy jam, No. 10 cans they were, in cases that were sitting on top of the chair. There was another case alongside in order to make a kind of stepladder to obtain entrance.

Q. What else did you see?

A. There was this can of fuel called Blazo sitting beside the chair.

(Testimony of Joseph Brantley.)

Q. How far from the chair was the can of Blazo? A. Eight inches maybe.

Q. Would you describe the can of Blazo and the condition in which you found it?

A. The little plastic cap that covers it was missing, and the can had been almost used up. There was about a gallon of fuel left in the can.

Q. What did you do after entering the room, after you saw that?

A. Well, we started looking for anything that would hold water, to start working on the fire.

Q. Did you find anything of that nature?

A. Yes. We found a No. 10 tin that we used to start off first with. I knew the matter of speed would determine whether the building could be saved or not, and we got, I managed to get about two gallons of water out of the faucet in the upstairs part. [27]

Q. In what area of the building was the blaze at the time you first arrived?

Mr. Crane: No blaze has been testified to. He said he saw smoke coming out.

A. I think I said there was a light from the fire in the attic.

The Court: You may first describe what, if any place, you saw it.

Q. (By Mr. Hermann): Yes. What, if any place, did you see it?

A. Well, the whole attic was on fire in there and was rolling around in there. It couldn't get, or hadn't got the draft to really break through.

Q. What did it consist of? Smoke, flame or what?

(Testimony of Joseph Brantley.)

A. Well red flames and smoke and it was all congested in there.

Q. How much of the building did that area occupy, with the smoke and flames?

A. Two-thirds of the whole upstairs attic there, of that one particular room. Two-thirds of that room was burned.

Q. How large an area? Can you describe it in terms of feet? How wide and how long?

A. Well, I would say about 20 x 24, 20 x 24 feet.

Q. Where was the burned area in relation to the chair with the boxes and the Blazo can?

A. Almost directly overhead.

Mr. Crane: Overhead of what, if your Honor please. The answer is indefinite.

The Court: You may have the right to cross examine. [28]

Q. (By Mr. Hermann): What did you do then? After discovering this thing you have described, what did you do?

A. Well, we started to work on the fire, and we managed to get the two gallons of water out of this faucet. The water line downstairs had been frozen and caused a steam pressure in the hot water tank, and we could only get steam through the faucet.

Q. Were you able to extinguish the blaze?

A. Yes, we were able to extinguish it.

The Court: I couldn't hear your answer.

A. Yes, we extinguished the fire.

Q. (By Mr. Hermann): How long did it take to extinguish the fire?

(Testimony of Joseph Brantley.)

A. It took an hour or hour and a half, to the best of my knowledge, to get it under control where we could put the fire out. I think it must have been about two hours of work there, carrying the water out.

Q. Who fought this fire?

A. Well, it was a community affair. We started a bucket brigade from the lake, or the waterfront, and we used most of the water downstairs, the fresh water tanks, on the fire. There was men going until the fire was put out.

Q. Was anything used besides water to extinguish the blaze?

A. I used some extinguishers, but they were very poor, practically completely empty. They didn't do any good at all.

Q. What type of extinguishers, if you know?

A. They were CO-2 extinguishers.

Q. Do you know how many people were in this upstairs back room during [29] the course of the fire?

A. No, I couldn't tell you that—the excitement, you know, too much of a strain.

Q. Do you know whether there were several, or just a few?

A. There were several people there, quite a few at times. At times it was so crowded you could hardly place the water.

Q. Would you describe the entrance to the attic as you saw it when you arrived at the scene.

A. This chair was setting underneath the attic hole that you go through, and a couple of cases——

(Testimony of Joseph Brantley.)

Q. Would you speak a little louder please.

A. ——a couple of cases of Sunnyboy jam in the chair.

Q. Would you just describe the entrance to the attic, please.

A. Just a hole about 18 x 24 inches.

Q. What did you see through that hole at the time of the fire?

A. Well, there you couldn't see too much inside, except the fire was going. There was a cord or rope or something hanging out of the hole. It kept getting in my way when I was putting water in the attic, and it seems as though I jerked it out of there.

Q. Is there any other entrance you know of to the attic, other than the entrance in that hole?

A. There is another entrance just before you go through the door into that room, at the entrance to the other room or overhead there.

Q. Is it possible to reach the area where the fire was from that entrance?

A. I think you could under normal conditions, but at the time of the fire, it [30] was impossible to get through because of the smoke. I tried to go through where I could get a better shot at the fire with the water, and I just got smoked out of there. I couldn't stay in there.

Q. Is the attic in one large room or is it in any way divided?

A. Basically, it is just one large attic but there has been a 2 x 8 or 2 x 6 partitioned off in that one area.

(Testimony of Joseph Brantley.)

Q. Where is that area in relation to the fire?

A. That is between the one entrance and the other.

Q. Then is it possible to go through the other entrance and reach the room where the fire was?

A. I think it would be; I think you could get over there when there was no fire going.

Q. Are there partitions between?

Mr. Crane: If your Honor please, I am going to object to the witness testifying to what he thinks. He has been up in the attic; he should know whether he could or couldn't get over there.

The Court: A witness may testify as to his observations. Have you read a recent decision of the Supreme Court, Mr. Crane, in which the Supreme Court has outlined quite at length the extent to which a lay witness may go in stating what might otherwise be considered an opinion, as to what his ordinary observations are.

Mr. Crane: That I quite agree with. I think I have had the decision recently in my office. What he saw I am not objecting to, but what he thinks I certainly am objecting to. He may think anything; he may have any kind of an opinion, and I object to what he or anybody [31] else thinks.

The Court: (To Witness) You should limit your testimony to what you saw or observed rather than what you think or guess.

Q. (By Mr. Hermann): Would you describe the partition in the attic.

(Testimony of Joseph Brantley.)

A. It is 2 x 6's and 2 x 8's. They are nailed on to these joists in there parallel, and there is an opening over the top. It was so dark in there—in that area when I was in there, I can't remember. Smoke too was in your eyes. I got into the opening about that far (indicating). I was trying to get the water over the top into the main fire.

Q. How does that partitioned area correspond to the room below it. Is it the same size? Smaller? Larger? A. It is larger.

Q. How much larger?

A. Well, just some 2 x 6's nailed across in the attic; the downstairs has a regular room partition.

Q. About what size is the attic portion where the fire was?

A. The attic where the fire was is the same as the room below it.

Q. By room below it, do you mean the room where the trap door was? A. Yes.

Q. While you were fighting this fire did you at any time see Steve Salinas?

A. Yes. Mr. Salinas came in approximately twenty minutes later, something like that.

Q. What, if anything, did he say at the time he came in? [32]

A. He asked me how we were doing and came over and looked up through the attic, and I told him I thought we had the fire put out, and he told me to let the fire go, that it had gone too far.

Mr. Crane: I object to that and ask that it be stricken; it's volunteered testimony.

(Testimony of Joseph Brantley.)

The Court: The answer was responsive to the question; objection overruled. He should lay a foundation, but that he is now attempting to do, show who was present. That was the last question asked. Who was present at the time?

Q. (By Mr. Hermann): Who was present at the time Mr. Salinas said that?

A. There is only one that I can be sure, or maybe two that was present. I think William Rexford was present, and Sammy Henry I think was present.

Q. Where were you at the time he made that remark?

A. Well, I was pretty busy. I was right underneath the trap door there.

Q. What, if anything, did Mr. Salinas do to fight the fire?

A. No aid was taken by Mr. Salinas.

Q. Would you speak a little louder please, when you answer the questions. How did he act at the fire?

A. There was no excitement; he was very calm. In fact I didn't see too much of him just right while I was busy there.

Q. About how long did he stay near the fire, if you know?

A. He stayed there I think until he went downstairs with me to start to work on thawing out these water pipes downstairs.

Q. Did you talk to Mr. Salinas at all again that night of the fire at the restaurant? [33]

(Testimony of Joseph Brantley.)

A. Yes. We had quite a talk. I explained the set up to him that was underneath the trap door, and told him that someone had set the fire in my opinion.

Q. What did he say at that time?

A. He said he thought so too; that he thought someone had set the fire.

Q. Was anything further said in regard to the fire by Mr. Salinas at that time?

A. Yes, there were considerable things, but I just don't seem to be able to remember too much.

Q. Did he indicate what action should be taken about the fire?

A. I told him I thought the fire had been set and that we should notify the United States Deputy Marshal.

Q. What did he say?

A. He asked me not to. He said since the fire had been set he thought we could catch the guy who did it ourselves.

Q. How was Mr. Salinas dressed the night of the fire?

A. I can't remember exactly. I think his clothes, I think they were dress clothes. He had his white shirt.

Q. What?

A. His white shirt, and a bow tie he had on.

Q. Do you recall what kind of footwear he was wearing?

A. Yes. I think he had a pair of U. S. Air Force sheeplined boots on.

(Testimony of Joseph Brantley.)

Q. What time was it the last you saw Mr. Salinas the night and early morning of the fire?

A. It was the next morning. I worked most of the night, in fact until [34] six o'clock in the morning cleaning up the place, and getting it cleaned up as he had wanted, and I was in bed. It was approximately ten o'clock and he came down and woke me up and told me it looked like someone had tampered in his room again and maybe the stove had blown up or something. He said there was soot all over the place.

Q. What did you do then?

A. He asked me if I would get up and go down and take care of it, and I told him "sure."

Q. Did you do that?

A. Yes. I got out of bed.

Q. Now while you worked at the Kotzebue Grill prior to the fire, did you ever at any time see a blazo can on the premises?

A. Yes. We kept blazo there for our blowtorches.

Q. Where was this blazo kept?

A. Well, as a rule, it was kept in the ice house—you know—a place where it would be safe.

Q. Did you ever use this can yourself?

A. Yes. I have used it a number of times.

Q. When was the last occasion you used it before the fire?

A. On or about the 18th or 20th I used the last of the Blazo in that can to fill up my blow torch.

Q. What do you mean by "that can"?

(Testimony of Joseph Brantley.)

A. Well later I found there was another can in the upstairs.

Q. When did you find that?

A. Well, it was sitting in the far end of the building, right near a stove. There was a stove in there but it wasn't used at the time. [35]

Q. Where was the can in relation to the room below the attic where the fire was?

A. It was sitting way against the wall and the hole in the attic was almost in the center of the room.

Q. When was the last time you used the blazo in that room?

A. The day before. It would be the 24th of December.

Q. What were you using the blazo for?

A. For thawing out your drain pipes for our sink downstairs. I filled up my blow torch.

Q. Did you notice how much was in the can at that time?

A. Yes. There was only two, maybe three, uses out of it for the torch. The torch holds about a quart.

Q. Do you know how much was in it in gallons, about how much?

A. Four gallons would just about be it.

Q. How large a container was it?

A. A five gallon can.

Q. Where did you leave that can on the day you used it on the 24th?

A. I left it in the back side of the room there.

(Testimony of Joseph Brantley.)

Q. Do you know of any other blazo cans in the Kotzebue Grill other than the empty one in the ice house and the one you have just described?

A. Yes. There is another can there that I found after the fire that I didn't know was there.

Q. Where did you find it?

A. In the far front end of the building.

Q. Where abouts? [36]

A. In a little closet there. I think it had once been a closet.

Q. Do you know whether or not that can was full or partly empty?

A. Yes. It was full and sealed. The seal had never been broken on it.

Q. Had you ever seen that can prior to the fire?

A. No, I hadn't seen it.

Q. Now in the month of December, prior to this fire, do you know whether or not the Kotzebue Grill was doing a large business or a small business or what type of business?

Mr. Crane: That's incompetent, irrelevant, and immaterial, what business was going on, how much business they were doing. It is not an issue in this case.

The Court: It could quite conceivably be an issue. Objection overruled.

Mr. Crane: And the further objection, if your Honor please, if the witness knows.

The Court: Well, that's what he was asked; if he knows.

A. Yes, I know. We were doing a very slow

(Testimony of Joseph Brantley.)
business. I don't think we were even holding our own.

Q. (By Mr. Hermann): Now in your capacity as a cook, do you have any knowledge of the amount of supplies on hand at the Kotzebue Grill on the 25th of December?

A. Yes. I know what supplies we had.

Q. How many supplies were on hand in relation to the normal amount customarily kept on hand?

A. We had no shortage in meat except hamburger meat. We were running a [37] great shortage in hamburger, and fresh vegetables like lettuce, tomatoes and carrots and celery, things like we normally have to have most every day.

Q. Do you know whether or not anything of that nature had been ordered by anyone at the Kotzebue Grill?

A. Orders were sent in to Mr. Salinas.

Q. On what date were those orders sent in?

A. Around the first part of December; the exact date I can't remember.

Q. Had those supplies arrived by the 25th?

A. No. They had not arrived.

Q. Did you take any action yourself in relation to the ordering of those supplies?

A. I asked Mr. Salinas about it, if he had ordered them and he said that he had, that they had been ordered. And we kept waiting, and as a rule it takes about a week and a week and a half for supplies to get there, and three weeks or so had elapsed and we were late sending the order in, and so we were running short.

(Testimony of Joseph Brantley.)

Q. Do you know whether or not he did order those supplies?

A. In checking with Alaska Communications System, I found that no orders had been sent in for the month of December, no orders at all.

Mr. Crane: If your Honor please, I ask that that be stricken. It's strictly hearsay. He says he checked with Alaska Communications System.

The Court: And found that no orders had been sent in. You mean that you checked the records?

A. Yes. [38]

The Court: That's what I understood him to say.

Mr. Crane: What right has he got to check the records of ACS?

The Court: If your objection is that his testimony is not the best evidence, probably your objection is a valid one, but not that it is hearsay. Objection sustained on that basis.

Mr. Hermann: His evidence is to the effect that there were no records of the orders, so there would be no issue.

The Court: I haven't heard any such evidence. Oh, yes. I see. We have the question then of whether the records are the best evidence if there are no records.

Mr. Crane: If your Honor please——

The Court: Just a minute now——

Mr. Crane: If your Honor please, he said he checked the records of ACS, and in the first place he has no business checking their records.

The Court: That has no concern with your objection to this testimony.

(Testimony of Joseph Brantley.)

Mr. Crane: If he checked the records, the records are the best evidence. I want to see the records he checked.

The Court: Upon the grounds that the records would be the best evidence the objection must be sustained.

Q. (By Mr. Hermann): Do you know whether or not these supplies ever, in fact, arrived?

A. No, they didn't arrive. [39]

Q. They never arrived?

A. No, they didn't.

Q. If they had been ordered they would have arrived after the fire?

A. Yes, after we closed. But we never received such an order.

Q. Was there a shortage of anything else besides hamburger and fresh stuff?

A. Our fuel oil was running low in our tank.

Q. Do you know whether or not any fuel oil had been ordered for the tank?

A. Yes, fuel oil had been ordered. Esther Ipalook and myself ordered the oil.

Q. What date was that?

A. It was around the 21st or 22nd of December. And even earlier we had ordered it. I thought we were running on a shoe string.

Q. Who ordered it? Mr. Salinas or yourself?

A. Yes, the order was turned over to Mr. Salinas and at that time he said he would order it or have Charlie Wilson order it.

(Testimony of Joseph Brantley.)

Mr. Crane: Who was that last? Who ordered it?

A. Charlie Wilson.

Q. What date was the order turned over to him?

A. I can't remember. I was along the last part of the month. It was turned in to him two or three times.

Q. To Mr. Salinas? A. Yes.

Q. Did that oil requested of him arrive at all, to your knowledge? [40]

A. No. We had asked him about it and he said he had ordered the oil, and Esther made a special trip—Esther Ipalook—to Standard Oil to check on it, and no oil had been ordered.

Mr. Hermann: Well, that is not relevant.

Mr. Crane: I move we strike that as not responsive—as to what Esther Ipalook may have told him.

The Court: The answer may be stricken and the jury instructed to disregard anything as to what somebody told him.

Mr. Hermann: What I understood you to say that Esther Ipalook told you, that is not proper.

The Court: The jury may disregard it.

Q. (By Mr. Hermann): Now how long did Mr. Salinas remain in Kotzebue after the fire to your knowledge?

Mr. Crane: That is objected to, if the Court please, as immaterial how long the man remained in town after the fire.

The Court: Overruled. He may answer.

A. One day.

Q. (By Mr. Hermann): One day?

(Testimony of Joseph Brantley.)

A. Yes.

Q. Do you know the day he left?

A. December 27.

Q. What was the date of the fire then?

A. December 25. [41]

A. I see. Had he ever, prior to that, in any way notified you that he had been leaving, that he was going to leave?

Mr. Crane: Objected to as incompetent, irrelevant and immaterial, what he notified him, what the man's intention was, what he was going to do in the future. It is not competent evidence.

The Court: Overruled.

Q. (By Mr. Hermann): Had he ever previously notified you he was going to leave?

A. Yes, he said he was going to leave. I didn't know the exact date, but I knew he was going on vacation.

Q. Did he ever at any time tell you what date or approximately the date he was going on vacation?

A. No. I knew it would be in December sometime, but I didn't know when.

Q. Now when Mr. Salinas left, who was in charge of the building after that, if you know?

A. Well, I was the one that was left in charge. I had the keys to the place and he gave me the final instructions.

Q. What type of instructions did he give you?

A. Well, about the interior decorating of the dining room and things that needed to be done, like a new firebox in the cookstove.

(Testimony of Joseph Brantley.)

The Court: It would be convenient at this time to take a recess for ten minutes.

(Thereupon, at 11:00 a.m. the Court duly instructed the jury and a ten minute recess was taken.) [42]

After Recess

(All persons necessary being again present, court reconvened and the trial of this cause was resumed. Both counsel stipulated that the jury were all present.)

The Court: Very well. You may proceed with the examination of the witness.

(The witness on the stand at the time of recess resumed the stand for further direct examination.)

Mr. Hermann: I would like to have this exhibit marked for identification purposes. It consists of five photographs.

Mr. Crane: Are those the ones, Mr. Hermann, that I stipulated to?

Mr. Hermann: These are the ones taken by Mr. Land, the polaroid photographs. You have seen them. These are exterior shots.

Mr. Crane: Might I inquire, is Mr. Land going to be a witness here?

Mr. Hermann: No.

Mr. Crane: They haven't been offered yet?

The Court: They may be marked as plaintiff's Exhibit A for identification.

(A series of five photographs is marked as

(Testimony of Joseph Brantley.)

plaintiff's Exhibit A-1, A-2, A-3, A-4, A-5, for identification.) [43]

Q. (By Mr. Hermann): Mr. Brantley, I hand you plaintiff's Exhibit A for identification and ask you if you have seen this before?

A. Yes, I have seen them.

Q. When was the first time you have seen those?

A. In Kotzebue. The date was in January, I think. I can't remember the date.

Q. Do you know about what part of January it was?

A. Around the last part I think, the last part of January.

Q. Where did you see them on that occasion?

A. I saw Mr. Land take these shots.

Q. What kind of a camera were they taken with? A. A Polaroid camera.

Q. Did you see the photographs as they came from the camera? A. Yes.

Q. Do those appear to be the same photographs you saw from the camera?

A. Yes, they are the ones.

Q. What are those photographs of?

Mr. Crane: That's objected to, if your Honor please, to showing at this time what the photographs are of. He said he was present when they were taken with a certain type of camera, but proper foundation has not been laid for introducing them in evidence. It is not proper for him to testify to what they are at this time.

The Court: On the contrary, it would not be

(Testimony of Joseph Brantley.)
proper to offer them in evidence unless he first testified as to what they are. [44]

Q. (By Mr. Hermann): What are those photographs of?

A. The exterior part of the Kotzebue Grill.

Q. I hand you plaintiff's Exhibit A-1 for identification and ask you what view that is of the Kotzebue Grill?

A. That is the front end of the building, the west end facing the waterfront, the main entrance to the restaurant.

Q. Can you tell whether or not that is the way the building actually appears?

Mr. Crane: And the further objection, if your Honor please, that this is just a roundabout way of getting into evidence the description of what they are and putting before the jury what they are.

The Court: It certainly must be shown what they are. Objection overruled.

Q. (By Mr. Hermann): Can you tell whether or not that is the way the building actually appears from that view?

A. Yes. That is the way it looks from the front.

Q. Do you notice any distortion or other things which would make the picture inaccurate?

A. No. I see nothing.

Q. I hand you plaintiff's Exhibit A-2 for identification and ask you what that is a photograph of?

A. That's the south side of the building. There's a little storm shed there that you go into, into the kitchen part, the kitchen part of the restaurant.

(Testimony of Joseph Brantley.)

Q. Can you tell whether or not that is how that actually appears to a person standing in such a position? A. Yes.

Q. Do you notice any distortion or irregularities in the photograph?

A. No. I see nothing.

Q. I hand you plaintiff's Exhibit A-3 for identification and ask you what the view is of that building?

A. That's the north side of the building where our fuel tanks are located.

Q. Can you state whether or not that is how the building actually appears to a person standing in that direction to the building?

A. Yes. That is the way it is.

Q. Do you notice any irregularities or distortion in the picture? A. Nothing.

Q. I hand you plaintiff's Exhibit A-4 and ask if you recognize that? What angle was that taken from?

A. That is the east end of the building where they have the ice shed, and the upstairs addition where the fire was.

Q. Can you state whether or not that is how the building appears from that angle? A. Yes.

Q. Do you notice any irregularities or distortion in the picture? A. No. Nothing.

Q. I hand you plaintiff's Exhibit A-5 and ask you what is that a picture of? [46]

A. That shows a portion of the stairway, and the upstairs platform for the upstairs entrance into

(Testimony of Joseph Brantley.)
the building. That is the south side of the building.

Q. Is that how the building actually appears to a person standing in that angle? A. Yes.

Q. Do you notice any irregularities or distortion in the picture? A. No.

Mr. Hermann: At this time I would like to offer plaintiff's Exhibit A-1 through A-5 into evidence.

Mr. Crane: Objected to, if your Honor please because proper foundation has not been laid. The man is available who took the pictures. He should be called if he is the photographer. Certainly this man has not qualified himself. He said he was present when the man took the pictures with a Polaroid camera and is not the best evidence, and foundation has not been laid.

The Court: I have always held, and I think correctly, that if pictures or photographs are offered in evidence and properly identified as to the substance of the picture and the time of taking of them, that the photographer who took them need not be called. I think that is correct. Objection overruled. The photographs may be received in evidence.

Mr. Crane: The further objection, your Honor, there is no time set as to when the pictures were taken. Further there is a stipulation between the United States Attorney and I that he could [47] use my photographs and I could use his.

The Court: I am aware of no such stipulation counsel. As far as the time is concerned, it could

(Testimony of Joseph Brantley.)

possibly be fixed a little more accurately, but the witness says early in January. I think that is sufficient. The photographs may be received.

(Plaintiff's Exhibit A-1, A-2, A-3, A-4 and A-5, are received in evidence.)

Q. (By Mr. Hermann): Now, Mr. Brantley, are you able to point out in any of these photographs the place where the fire was discovered to be?

A. Yes. The fire was discovered in this part up here (indicating).

Mr. Taylor: Just a minute, your Honor, we are going to object to any testimony unless the witness refers to it by exhibit number so we will know.

The Court: Yes. That should be done.

Q. (By Mr. Hermann): Will you please refer to the exhibit number on the back.

A. It's Exhibit A-2.

Q. Would you hold it so the jury could see it and point to the place of origin of the fire.

(The witness holds up the exhibit and indicates.)

A. Should I walk up a little closer?

Q. Just hold it up. [48]

A. In this area (indicating), and up in the attic part of the building.

Mr. Hermann: I would like to hand the exhibit to the jury.

Mr. Crane: Could we see the exhibit, Mr. Hermann, please.

(The exhibit is handed to Mr. Taylor.)

(Testimony of Joseph Brantley.)

Mr. Taylor: We would object to the use of this in connection with the testimony of this witness because this shows the outside of the building, your Honor. There is no testimony that any fire occurred in the outside of the building.

The Court: That objection would go to the weight rather than the competency of the question and answer. Objection overruled. However, for purpose of clarity some identifying mark should be made on the photograph by the witness to show the place that he has pointed out. How about putting an X on there.

Q. (By Mr. Hermann): Would you put an X on the area, including the room where the fire was located.

(The witness marks the exhibit.)

Q. Perhaps if you put an arrow on the sky portion——

Mr. Taylor: Did you say to put an "L" on the side of it?

Mr. Hermann: I said to put an arrow.

The Court: The photograph may be shown to the jury.

(The photograph is handed to the jury.)

Q. (By Mr. Hermann): Mr. Brantley, would you state whether or not the door which you first entered the premises, after you were first notified of the fire, is shown on [49] any of those photographs, and tell which photograph, if any, that door is indicated on?

A. Yes. This door (indicating).

(Testimony of Joseph Brantley.)

Q. What is the number of that picture?

A. This is Exhibit 4-A.

Mr. Hermann: I would like permission to show Exhibit 4-A to the jury.

The Court: Would you also please ask the witness to identify with some mark—is there only one door shown?

Mr. Hermann: Yes.

The Court: Still, it should be marked.

Q. (By Mr. Hermann): Would you put an X on the door.

(The witness marks the photograph and it is then handed to Mr. Taylor.)

Q. Mr. Brantley, would you please state whether or not the door to the upstairs by which you entered the upstairs the night of the fire is indicated and give us the number of that picture, if there is one.

A. This is Exhibit 3-A.

Q. Would you place the letter Y on that door.

Mr. Taylor: Why Y?

Mr. Hermann: The other one was an X and I don't want to confuse them.

The Court: He may have them marked any way he desires.

(The exhibit is then shown to Mr. Taylor and Mr. Crane.) [50]

Mr. Taylor: No objection.

(Both photographs are then handed to the jury.)

Mr. Hermann: I would like to present A-1 and A-5 to the jury without further comment.

(Testimony of Joseph Brantley.)

Mr. Taylor: Just a minute, your Honor. I am going to object to the self-serving declarations written on the back of them without consent of court or counsel.

The Court: On all of them?

Mr. Taylor: All of them.

The Court: There does appear to be some writing on the backs of each of these to which the attention of the Court has not been called until now, and the witness should be asked to explain this writing.

Q. (By Mr. Hermann): Mr. Brantley, are you aware of the writing on the backs of the photographs? A. No. I didn't—I never——

Mr. Hermann: We have no objection to the writing being on. We attach no attention to it.

The Court: Do you know whose handwriting that is, Mr. Brantley?

A. No, sir. I couldn't be sure about the handwriting.

The Court: It is not yours? A. No, sir.

Mr. Taylor: We move, your Honor, that the Exhibit be withdrawn from the jury. [51]

The Court: Well, unless the handwriting can be identified, the exhibit should be withdrawn and the writing obliterated.

Mr. Herman: Yes. Would it be better to have the Clerk do it? At the same time, if your Honor please, I thought it might be possible, whoever did the writing, the man, if he was here——

The Court: Objection has been made to this writ-

(Testimony of Joseph Brantley.)

ing and as long as objection has been made we will obliterate it. Mr. Clerk will you please do that. (To the jury). These exhibits, on account of these objections, would you hand them up just now. We have to take off some matter which appears on the backs.

(The exhibits are handed to the Clerk.)

The Court: You may proceed.

Q. (By Mr. Hermann): Mr. Brantley, to your knowledge was any inspection made of the premises after the fire by law enforcement officers?

Mr. Crane: I didn't get the question entirely.

(The Reporter reads the previous question as follows: "Mr. Brantley, to your knowledge was any inspection made of the premises after the fire by law enforcement officers?")

A. Yes, there was an investigation.

Q. Who made the investigation?

A. Mr. Archie Adirim, United States Deputy Marshal, Kotzebue.

Q. Any others?

A. You mean the total time elapsed after the fire?

A. At any time after the fire. [52]

A. There was the OSI, I think, went through there. I think that's what they were, OSI arson squad man.

Q. What was his name, please?

A. I can't quite remember his name.

Q. How did these people gain entrance to the building? A. I let them in.

(Testimony of Joseph Brantley.)

Q. Do you know whether or not they took anything from the building?

A. Yes. They took just things that were necessary.

Mr. Crane: If your Honor please, I would object to that—what things were necessary. Let him testify to what articles they took, if he knows.

The Court: That is correct. You may state what articles were taken, not your judgment of what were necessary.

A. They took a sample of the sawdust insulation that lays in the attic. They took four rings that appeared to me to have come from ice cream containers. They took one egg-shaped object that looked like the bottom of a waste basket. They took one cord, an insulated cord. And they took one igniter, I guess you would call it an igniter, that comes out of a soldering iron.

Q. (By Mr. Hermann): Do you know where they took each of these items from?

A. From the attic, from the attic area in which the fire started.

Q. Do you know whether or not they were given permission to take these?

A. Yes. I gave them permission to take the items.

Q. Did you give them permission orally or in writing? A. Well, orally. [53]

Q. And do you know on how many occasions they visited the attic or upstairs?

A. No, not the exact number. There were some

(Testimony of Joseph Brantley.)
visits I didn't keep track of.

Q. Were you present on each of these visits?

A. Each time I let them in the building.

Q. Now after the fire did you make any examination of the building yourself?

A. No, I didn't examine it myself.

Q. Have you been through the building since the fire? A. Yes.

Q. Have you noticed any indications of any breaking into the building or anything of that nature?

A. No. There was no forced entrance to the building.

Q. What type of windows does the upstairs of the grill have?

A. They have regular glass and frame windows.

Q. Do you know whether they are the type of windows that open and close or not?

A. No. They are stationary; they do not open.

Q. Would you describe the metal hoops you have mentioned.

A. They are just circular, about; they are crimped tin metal in a round circle that would fit over a gallon container.

Q. What type of gallon container?

A. Where I saw them at was on ice cream containers.

Q. Do you know whether or not there were any such ice cream containers [54] in the Kotzebue Grill before the fire?

A. Yes. We had ice cream there with one-gallon containers.

(Testimony of Joseph Brantley.)

Q. Do you know how many there were?

A. No, I don't know. We had a lot of them that had ice cream in them, and we had three or four that I think were empty.

Q. Do you know whether or not there were any waste paper baskets in the Kotzebue Grill before the fire?

A. Yes, there were waste paper baskets.

Q. How many were there?

Mr. Crane: If your Honor please, at this time I am going to object to this testimony, of him continuing to testify about these articles. If they are available they should be brought into court at this time.

The Court: The witness is apparently identifying the articles that were taken and as long as he is describing those which were taken I find no objection to it. Overruled.

A. To my knowledge there were two, maybe three—I am not real sure about the amount of baskets there were.

Q. (By Mr. Hermann): Well, when you say two or three, do you refer to empty or full containers. A. The waste paper baskets.

Q. Waste paper baskets?

A. Yes. Two or three of them.

Q. Have you seen any since the fire?

A. Yes. In Mr. Salinas' room, and I think one was in Charlie Norton's room. [55]

Mr. Taylor: Will you talk a little louder, please, so we can hear you?

(Testimony of Joseph Brantley.)

A. Would you like for me to repeat it?

Mr. Taylor: Yes, if you will.

A. There was one waste basket in Mr. Salinas' room, and there was one in Charlie Norton's room. That was the room across.

Mr. Taylor: Let me stand up and would you repeat it again a little louder, if you will.

A. There was wastebasket in Mr. Salinas' room and there was a waste basket in Charlie Norton's room.

Mr. Taylor: Did they take both of those?

The Court: You may have an opportunity to cross examine at the proper time. Also, I am going to ask both counsel to stand during the examination of this witness.

Mr. Taylor: When I am sitting down here I cannot hear him——

The Court: Well, you may ask the witness to speak up, and you should not stand while the other counsel is examining the witness, both you and Mr. Crane. It is too distracting.

Mr. Taylor: I only did that for the purpose of trying to hear.

Q. (By Mr. Hermann): Mr. Brantley, do you know whether or not there was a waste basket in each of those rooms after the fire?

A. Yes. There was one in each room.

Q. Were there any other waste baskets in the building before the fire, other than in each of those two rooms? [56]

A. I couldn't answer for sure; I couldn't say for sure.

(Testimony of Joseph Brantley.)

Q. Could you state whether or not the portion removed from the attic in any way resembled the waste baskets in those two rooms? A. Yes.

Mr. Crane: Objected to, if your Honor please, to if they resemble something——

The Court: Objection overruled. Again, it's purely a matter of observation, and that's not opinion.

A. Yes, it resembled the waste basket that was in Mr. Salinas' room. It was the same shaped bottom about.

Q. (By Mr. Hermann): Do you know where the sawdust was taken from?

A. Yes. It was taken——

Mr. Crane: What sawdust, your Honor?

The Court: He testified to some samples of sawdust being taken by the inspector. The question is, where was it taken from?

Mr. Crane: I stand corrected, your Honor.

A. They were taken from within 18 to 20 inches of the opening of the entrance to the attic, adjacent to that portion of the area there.

Q. Do you know how much was taken?

A. Well,——

The Court: Counsel, must you stand? If you can't hear well, perhaps we had better readjust the tables here somehow.

Mr. Crane: I am sorry, your Honor. May I have the last question read.

(The reporter then reads the previous question as follows: [57] "Do you know how much was taken?")

(Testimony of Joseph Brantley.)

Mr. Crane: If your Honor please, I am going to renew my objection to the witness testifying about the quantity and quality of these articles until they are first introduced and offered into evidence. Let them be brought into court and identified. He says this was taken and that was taken, and it is getting to be a long record——

The Court: On the contrary; and say the articles were brought in and not identified——

Mr. Crane: I thought he could identify them if they were brought in.

The Court: Objection overruled.

Q. (By Mr. Hermann): How large a quantity of sawdust was taken, if you know.

A. Approximately a pint or so for laboratory tests.

Q. Do you know how much sawdust there was in that attic?

A. Yes. This attic was insulated with sawdust, the entire attic.

Q. How thick, if you know, was the sawdust in the attic?

A. About an inch or inch and a half thick.

Q. Exactly where were you when the sawdust was removed from the attic?

A. I was present right under the attic hole. The officers were inside.

Q. Could you please state whether or not you noticed any odors at that time?

A. Yes. You could smell the gas in the sawdust. I was asked to take a smell of it, and it was very strong. [58]

(Testimony of Joseph Brantley.)

Q. I see. No further questions.

The Court: You may cross examine. You may cross examine, counsel.

Mr. Crane: Excuse me. Does your Honor wish me to start?

The Court: I think we could use the rest of the time before noon.

Mr. Crane: Very well.

The Court: Yes. It is not yet quite time for recess.

Cross Examination

Q. (By Mr. Crane): Mr. Brantley, how long have you lived in the Kotzebue area?

A. Two years. It will be two years this summer.

Q. Prior to that, where did you reside?

A. Lansing, Michigan.

Q. What has been your occupation since coming to Alaska?

A. I worked in an automobile factory.

Q. Since coming to Alaska?

A. Since coming to Alaska. I worked for Wien Airlines since I was here.

Q. Where did you work for Wien Airlines?

A. Kotzebue Station.

Q. For how long? A. For one year..

Q. After that what did you do? Did you terminate your employment with Wien? A. Yes.

Q. After that what did you do? [59]

A. Well, from that time I just worked part time work. I worked for the Bureau of Land Manage-

(Testimony of Joseph Brantley.)
ment and I worked for Alaska Airlines a little, part time, and I worked for Western Electric.

Q. Who else? A. Mr. Salinas.

Q. Between the time you left the Airlines then, you held the three other jobs before you went to work for Mr. Salinas? Is that correct?

A. Yes.

Q. Now let me get this again? What date did you go to work for Mr. Salinas?

A. It was on November 17. I can't be sure of that date but I think that's it?

Q. And you worked in steady employment for Mr. Salinas up to the time of this fire on Christmas day? A. Yes, that's right.

Q. And then after the fire you continued on as manager and custodian and so forth of the place?

A. That's true.

Q. For Mr. Salinas? A. Yes.

Q. You had full charge and had the keys of the place from the time Mr. Salinas left for his trip Outside until he returned?

A. No, I turned them over to him.

Q. Your employment at this time has ceased as far as you and Mr. Salinas are concerned? [60]

A. That's as of the date I turned the keys over to him.

Q. What I am getting at, you are not now the employee of Mr. Salinas? A. No.

Q. But you were up until what date?

A. Until the date he returned.

Q. Do you know approximately that date? A

(Testimony of Joseph Brantley.)
week ago, two weeks ago, a month ago? Do you mean when he returned from his vacation?

A. When he returned the first time from Outside.

Q. That was probably a month or so ago? Would that be about right? A. Yes.

Q. Now, Mr. Brantley, coming down to Christmas Eve—that would be the day before the fire—were you working in the place that day?

A. No.

Q. Who was working there?

A. No one. It was Christmas Day.

Q. I said Christmas Eve.

A. Yes, I worked Christmas Eve.

Q. I will make it more definite. On the 24th, which would be the day before Christmas, what time did you go to work that day?

A. At 7:00 a.m.

Q. And you worked until what time?

A. 4.00 p.m.

Q. Who relieved you on your shift at 4:00 p.m.?

A. Esther Ipalook. She comes to work at 11:00, and then I go after the dinner meal is prepared.

Q. What I am getting at, Mr. Brantley, is this: when Mr. Salinas was away from the restaurant, you were the one in charge, were you not?

A. Yes. Well, I wasn't fully in charge so long as he was there. I wasn't put in charge until after he left; the day before he left he gave me my instructions.

Q. Well, now, coming back to the day prior to

(Testimony of Joseph Brantley.)
the fire, what I am trying to do is place who all was there; what help did you have? Were you cooking alone or did you have assistance in there?

A. I cooked alone until 11:00; then I had help come in at 11:00.

Q. Who was that help?

A. Esther Ipalook, Meta Sheldon, and Dolly Wilson I think was working.

Q. Dolly Wilson was working there on the 24th, was she? A. I think she was there.

Q. What were her duties?

A. Waitress. She did waitress work and washed dishes and cleaned the place up.

Q. And she came to work at 11:00 and Esther Ipalook came on at 11:00—now they worked until what time? A. Until the place closed.

Q. Now who relieved you from cooking at 4:00 o'clock? A. Esther.

Q. All right. Now, if you know, who closed—first, I will ask you what time on the 24th was the place closed for business?

A. At 8:00 o'clock.

Q. At 8:00 o'clock? A. Yes. [62]

Q. Now who was in charge of the place at the time that the restaurant was closed at 8:00 o'clock? On the 24th. A. Esther Ipalook.

Q. Esther Ipalook. Who else was working there at that particular time? A. Charlie Wilson.

Q. Now you mentioned Charlie Wilson—Do you mean Dolly Wilson?

A. I mean Dolly and Charlie both worked there,

(Testimony of Joseph Brantley.)

but Charlie didn't come in until night.

Q. What was Charlie Wilson's duty?

A. He cleaned the place up, emptied the garbage cans, cleaned the upstairs also; took care of the place in that respect.

Q. Now Charlie Wilson acted as janitor, and Charlie cleaned both the downstairs and upstairs?

A. Yes, that's true.

Q. All right. Who else, from 4:00 o'clock on the 24th until closing time, had access to the upstairs—Does your Honor have something——

The Court: We may take the noon recess at this time and recess this case until 2:00 o'clock.

(Thereupon the Court duly admonished the jury and the regular noon recess was taken.)

After Recess

(At 2:00 p.m. court reconvened and the trial of this cause was resumed. The jurors present returned to the jury box, and the witness on the stand at the time of recess resumed the stand for further cross examination.) [63]

The Court: Defendant and all counsel are present, but one juror appears to be absent. The bailiff is trying to get him on the phone just now so we will wait just a minute.

While we are waiting counsel, there was no motion to exclude witnesses. Are you excluding them?

Mr. Hermann: I have instructed them to exclude all witnesses and as far as I know none have been present.

(Testimony of Joseph Brantley.)

Mr. Crane: I am not too particular about it.

The Court: Well, it is generally best until after they have testified. Mr. Levine, you might call the hospital. Possibly some accident has befallen him. He is usually pretty prompt.

(There is some further discussion with reference to locating the missing juror.)

The Court: We might as well recess a little bit, or the jury may be excused and the witness may be excused. We will wait a little while longer. The jury may be excused for a few minutes until we try to locate the missing juror.

(The jury retired and the witness left the stand.)

The Court: While the jury are not present, counsel, it occurred to me this morning there are one or two adjustments we will need to make to our calendar.

(There then followed a short discussion by Court and counsel of calendar adjustments not related to the matter on trial.)

(Juror Seelkoke appears in the court room and the jury is [64] recalled. The witness resumes the stand.)

Juror Seelkoke: I am sorry. I was lying down a little bit and went to sleep.

The Court: We were afraid something might have happened to you and asked the Deputy Marshal to call the hospital for us.

Well, the jury now appear to be all present.

(Both counsel so stipulate.)

(Testimony of Joseph Brantley.)

Q. (By Mr. Crane): Mr. Brantley. I believe where I left off before noon recess was asking you who was employed on the 24th and 25th in the Kotzebue Grill at Kotzebue. I believe we got down to Charlie Wilson. What were Charlie Wilson's duties and what time did he come to work?

A. He came to work about 6:00 o'clock. He was clean up man. He cleaned the stoves up and the upstairs. That was about the extent of his duties.

Q. Now have you named all of the employees that was there on those dates as far as you know.

A. Meta Sheldon?

Q. Now did all of these employees of the Kotzebue Grill have free access to both the upstairs and downstairs of the building, the entire building, at all times? A. No.

Q. I mean while they were employed there.

A. No.

Q. All right. During their employment, who had access to the upstairs?

A. The upstairs key was hung on a nail downstairs for the upstairs use during the day. [65]

Q. Who could use that key?

A. Anyone there during the day.

Q. Then anybody had access to the upstairs?

A. But not to the full access to the whole building.

Q. What do you mean?

A. They didn't have access to the keys to the downstairs area.

Q. No. But anybody working in the building

(Testimony of Joseph Brantley.)

who was employed in the restaurant part or in the kitchen, or was employed during the day or early evening in the Kotzebue Grill could, at any time, pick up the key and go upstairs if they had any occasion to? Is that right? No restrictions on them? A. No.

Q. Now let's start with the Kotzebue Grill building. You say it was a two-story building?

A. Yes.

Q. Does it have a basement? A. Yes.

Q. What is in the basement?

A. There is a well where we get our water supply from for washing dishes, and just the line going into the well. The pump is on the first floor.

Q. What else, if anything? A. That's all.

Q. Are any commodities stored there?

A. No. [66]

Q. Is there any fuel oil there? A. No.

Q. Any gasoline? A. No.

Q. Let's come to the next floor then, which would be the main floor of the building. What is on the main floor of the building? Now I mean by that the restaurant part, the part the public has access to first.

A. It has a horse-shoe counter shaped, and has a juke box, and has some ice cream machines and freezers that haven't been in use. It has the pie shelves and it has a cash register and what dishes and things are stored on the shelves and on the bar and counter.

Q. You mentioned there are ice cream freezers

(Testimony of Joseph Brantley.)

not being in use. Are they not in use on account of faulty electric current into them?

A. I didn't understand it that way. I understand they were not in use on account of the high rate of electricity that they consumed.

Q. Do you know whether or not if you turned them on it would short the electricity in the building? A. No, I don't know that.

Q. Never tried to find out? A. No.

Q. Let's go from the restaurant part in the kitchen. What is in the kitchen?

A. A large oil range, two refrigerators, a shelf-type freezer, and they have the necessary arrangements for tables and shelves and things that are there. They have a deep fat fryer, toaster, electric fans that operate the motor of [67] the stove, and also for draft, and they have a kind of canopy covering for the stove, for the top.

Q. What are the conditions of the floor in that restaurant, especially around the stove area? Isn't it a fact that it's very much oil-soaked around and under the areas and under the stove part of the building and has been for years?

A. Yes, I would say it's considerably soaked with oil, yes.

Q. Now, let's go back to the building behind, directly behind the kitchen. How was it connected?

A. There is a hallway from the kitchen back. It has a motor back there for the deep freeze unit. And it is used for hanging coats and a little smoking room. It has a line running through there.

(Testimony of Joseph Brantley.)

Q. You say there is a motor in there. Was that motor in operating condition, if you know?

A. Now I am not sure whether it's a motor or a part of a unit for the deep freezer. I think the motor sits in there and part of the freezing unit is in there, the pipe line running to the deep freezer.

Q. Where is the deep freezer?

A. You have to go through the cooler and then to the side of that is one big room split in the middle.

Q. What electric equipment is in the deep freeze, if anything?

A. Just an electric light I think.

Q. Just a light? A. Uh-hum.

Q. Now we have the ground floor covered. Now to go from the first story [68] to the second story, just explain to the jury what you have to do to get upstairs?

A. First you have to take the key that is hanging on the nail there, and you have to go outside of the building around to the side, and up the stairway to a platform, and enter through a side door that you go into the upstairs.

Q. All right. Now when you get upstairs, when you go in the upstairs door, what is directly in front of you? What kind of a room do you go into?

A. Just one large room, almost the size of this room, when you walk into it.

Q. That room is used primarily for what purpose?

(Testimony of Joseph Brantley.)

A. It has filing cabinets and the office work is right there, and he has some of his commodities stored in there, and a washing machine. They do the laundry there for the restaurant, wash clothes.

Q. Now coming back to the office in this room, you go into what next? A. A hallway.

Q. That hallway is between what?

A. The hallway runs between the two large rooms; then partitions and rooms on each side as you go down the hallway.

Q. Now you say the hallway runs between the two large rooms. What do you mean by two large rooms?

A. Well the west end of the building has a very large room and the east end of the building has a large room.

Q. What is between those two rooms?

A. There is two bedrooms, and one small room, that isn't occupied, and then a little den in there they use for storing.

Q. Isn't there a washroom and toilet up above and opposite the rooms?

A. The washroom and toilet are just above the kitchen.

Q. Now who occupied these two bedrooms on the 23rd and 24th of January, 1957?

A. You mean during the nighttime?

The Court: Do you mean January?

Mr. Crane: I mean December.

A. No one occupied them fully during the day and night. They were used——

(Testimony of Joseph Brantley.)

Q. I mean who occupied them? Did anybody occupy them and if so, who?

A. Mr. Salinas partly occupied one of the rooms, his bedroom.

Q. What do you mean "partly occupied"?

A. Well, he didn't stay there during the night; he stayed at Rotman's.

Q. Did anybody sleep in the building during the 23rd, 24th or 25th? A. No.

Q. Had anybody slept there for a week before?

A. Not that I know of.

Q. Had anybody slept there for a month before?

A. Not that I know of.

Q. Had anybody slept there for two months before? A. That I don't know.

Q. Then it hadn't been used for sleeping quarters or dwelling quarters, had it?

A. Not recently. Mr. Charlie Norton occupied one room, and just how long before I went to work it was that he left I don't know. [70]

Q. But he did leave the premises and vacate them, abandon them, prior to your going to work for Steve Salinas?

Mr. Hermann: If your Honor please, I object to the form of the question.

The Court: It's cross examination and leading questions are proper on cross examination. Objection overruled.

A. Yes, he did.

Q. (By Mr. Crane): What date did you go to work for Steve Salinas?

(Testimony of Joseph Brantley.)

A. Around or about the 17th of November.

Q. All right. From the 17th of November up to and including the 25th of December, 1957, this place was not used as a dwelling house then? Is that your testimony?

A. That's right. It wasn't.

Q. That is correct. Now you stated on—if your Honor will pardon me a minute now—Now coming to the 23rd day of December, 1957, which is the day preceding the fire, you stated, as I recall, on direct examination, that you worked until four o'clock. Did you return to the building after your working hours, later in the evening of the 23rd?

A. It's very possible that I did. I can't remember for sure because I have went in there several times after my working hours.

Q. What I am getting at, Mr. Brantley, if you know—if you don't know, say so—is who closed the building the night before Christmas?

A. I think it was Charlie Wilson. Now I am not sure; I couldn't say for sure. [71]

Q. You don't know who the last person in the building was?

A. I could have gone in there myself.

Q. When was the last time on the 23rd—you say you could have gone in yourself—do you mean the downstairs? When was the last time on the 23rd when you were upstairs in the building?

A. The 23rd?

Q. Yes.

A. Just prior to my going off shift I imagine; I can't remember for sure.

(Testimony of Joseph Brantley.)

Q. What was your occasion for going up?

A. Well we have our washroom up there and we go wash up after we get off shift.

Mr. Crane: May I have your exhibit, Mr. Clerk, of the rooms.

(A paper is handed to Mr. Crane.)

Q. Mr. Brantley, did you on the afternoon of the 23rd go back into the room where the fire occurred, and if so at what time?

A. If I went in there the 23rd, which I don't remember whether I did or not, it would be early. It would be early for I would be going in for gas or some occasion like that.

Q. For what? A. For gas.

Q. Oh. There was gas kept in this back room?

A. There was a gas can in there.

Q. In other words, this room was the natural storage place for gas to your knowledge?

A. No, it wasn't the natural storage place. [72]

Q. Well if it wasn't the natural storage place, how did it come to be there on the 23rd? How do you know it was there, if you were present on the 23rd? How did you know?

A. Charlie Wilson told me.

Q. But you are not sure whether you went in there or not?

A. Not on the 23rd; I can't be sure of the date.

Q. That's the day before the fire.

Mr. Hermann: I object, if your Honor please. He is mis-stating the evidence completely.

The Court: The witness himself corrected you.

(Testimony of Joseph Brantley.)

You have been asking him about the 23rd, which would not be the day before the fire.

Mr. Crane: I mean the day before the fire.

The Court: In all these questions then, you had better begin again because you have been asking him about the 23rd.

Mr. Crane: I beg your pardon. I have been misstating myself.

Q. (By Mr. Crane): I mean the Christmas Eve, the day before the fire, what time did you go in the room upstairs where the fire occurred, if you went in there?

A. It would be early in the morning, if I went in there, because that's usually when all of our water pipes are frozen, when you first come on shift. That's when you need the gas to run the blow torch to thaw out the water line in the sink.

Q. All right. Then if you went in there on the morning of the 24th, you went in there for the purpose of getting some gas for the blow torch? Is that right? [73] A. That's right.

Q. Then you knew what was in the room on the morning of the 24th?

A. Yes, I knew there was gasoline there.

Q. All right. Was it the same gasoline can you testified was still there after the fire? A. Yes.

Q. Had it been disturbed any from the 24th? Had it been moved around?

A. The can had been moved.

Q. You don't know whether it was moved in the course of the fire by the fire fighters or not?

(Testimony of Joseph Brantley.)

A. I was the first one in to the scene of the fire. Unless someone else had a key and went in there and left after I did.

Q. Are you certain that you were the first one into the scene of the fire?

A. Unless someone else had a key and was in there and left after me.

Q. Do you know whether or not the lights were on? A. We also had two lights upstairs.

Q. Do you know as a matter of fact that the building was dark at seven o'clock at night?

A. No, I couldn't say.

Q. Did you look at it to see?

A. Not at seven o'clock.

Q. Didn't you state in your direct testimony that you were back in the building that evening—or did you? I don't want to misquote you. You didn't go back on the evening of the 24th? [74]

A. Not at seven o'clock.

Q. Did you go back at any time on the evening of the 24th? A. At five o'clock.

Q. Were the lights in the upstairs windows burning or not? A. I couldn't say for sure.

Q. As a matter of fact, isn't it a common practice there for you to leave lights on in the kitchen which are burning continuously, day and night?

A. Not in the upstairs. It's true we left the kitchen light on; and he required two lights on during the night in the upstairs, which he considered necessary, and we were to turn those off after coming to work.

(Testimony of Joseph Brantley.)

Q. After coming to work when?

A. In the morning, on the morning shift.

Q. Now let's once more get this straight. You were not upstairs in the Kotzebue Grill either in the afternoon or evening of the 24th?

A. Yes, I was.

Q. You were up there? A. I was.

Q. If so, at what time.

A. I was up there at approximately one o'clock and at four o'clock.

Q. At four o'clock? A. Yes.

Q. I don't mean Christmas Day; I mean the 24th, the day before Christmas.

A. On the 24th? I am sure I went up there then. I don't know about the back room, but I was upstairs. There is hardly a day goes by I didn't go upstairs. [75]

Q. All right. When you were upstairs the last time back in the room where the fire occurred, tell me, was the transom open into the attic?

A. The last time before the fire?

Q. The last time you observed it.

A. It was not.

Q. When did you first observe it open?

A. The night of the fire when I went into the building.

Q. All right. Now coming to Christmas, the day of the fire, let me ask you this: Were any stoves going upstairs? A. Yes.

Q. How many? A. One.

Q. Where was that?

(Testimony of Joseph Brantley.)

A. In Mr. Salinas' room. That was a small oil stove.

Q. That was the only stove burning upstairs?

A. That's true.

Q. Christmas day you went through there at what time first? A. Around one o'clock.

Q. What was your purpose in going up?

A. To fuel the stove in his room.

Q. What reason did you have to go in the back room, or did you go in the back room?

A. I did.

Q. For what purpose?

A. Just the usual thing; checking the building as I usually do. [76]

Q. And at four o'clock? A. Yes.

Q. You went in? A. Yes.

Q. You made a routine check? A. Yes.

Q. What was the condition of the building at that time?

A. It was normal, the way I stated previously. Everything was in order; there wasn't anything disturbed at four o'clock.

Q. Now what was the next time Christmas day you went in there?

A. About an hour later. It must have been around five o'clock to the best of my knowledge. I only went into the downstairs area.

Q. All right. At the time that you went up there at four o'clock, was the place normal, the gasoline can still sitting in the corner, everything of that kind? A. Yes.

(Testimony of Joseph Brantley.)

Q. This so-called booby trap wasn't set up, was it, at four o'clock in the afternoon, with the steps and chair? A. No.

Q. Now I am going to ask you to explain the night of the fire. First I am going to ask you—you say you were at home when they notified you of the fire? A. Yes.

Q. You went immediately to the building?

A. Yes. [77]

Q. Got the key from the downstairs?

A. Yes.

Q. Did you go back in the kitchen at that time?

A. You mean when I went to the fire? When I went in?

Q. Yes.

A. I had to go into the kitchen to get the key to the upstairs.

Q. You went clear in the kitchen? A. Yes.

Q. Did you see Thomas Goodwin and Gene Starkweather in the kitchen at that time putting soda in the range to put the fire out, before you went upstairs?

A. Gene Starkweather broke in through the back window after I had obtained the key for the upstairs, and he put soda in there. I didn't see him do it but I know it extinguished the fire in the cookstove.

Q. I assume from that then, it isn't true that Gene Starkweather and Tommy Goodwin was putting out the fire in the stove and cutting the oil lines off at the time you came in to pick up the key to go upstairs? A. No.

(Testimony of Joseph Brantley.)

Q. That's not true. Now when you got up to the fire what was the first thing you do? The first time you did, I should say.

A. Well, I proceeded to extinguish the fire. First I had a couple of boys with me and I told them to find any kind of containers, buckets or anything that would hold water. We needed water bad.

Q. What did you do with the water?

A. We threw it right on the fire. [78] The hottest part of the fire.

Q. What part was that?

A. The center of it.

Q. Up in the attic? A. Yes.

Q. Did you go up in the attic yourself?

A. Not at that time. After the fire was partially extinguished I tried to get up into the attic through a different door, trap door.

Q. Isn't it a fact that you were more or less excited that night? A. Yes, I was.

Q. Isn't it a fact that while you were downstairs, or under the trap door, that Tommy Goodwin and Gene Starkweather came up and, to use the exact expression, said to you "Why in the hell don't you get up where it's at?" and picked you up and boosted you up there?

A. No, not through them saying that. Maybe they came up too; after the fire was extinguished down I went in through another trap door, through another attic entrance. Who lifted me there I couldn't tell you.

Q. Mr. Brantley, now describe to me again just

(Testimony of Joseph Brantley.)
what all was on the floor under the trap door? You said there was a chair, cases of fruit, and what else?

A. There was a chair right underneath the trap door; there was two cases of Sunny Boy jam sitting in the chair; there was one case sitting beside the chair on the floor, which made a sort of stepladder.

Q. In other words, so you could step on one case and then step up on the other cases. Is that it?

A. Yes. Then you could pull yourself into the attic.

Q. All right. From the top of this so-called stepladder, you could [79] have access to the attic?

A. You could pull yourself into it very easily from the top.

Q. All right. That's what I want to get at. From the top of the stepladder could you reach in the attic and work or would you have to pull yourself up in the attic.

A. I would say it would be principally due to the height of the man.

Q. Say he was an average man. Could you, yourself, stand on the stepladder and use a soldering iron, and happer, a pair of pliers or other equipment to work with, or would you have to go in?

A. No, I could not, and see what I was doing. I would have to be a little taller.

Q. Not and see what you were doing? Now you testified that when you were with the investigating officers, you picked up pieces of wastebaskets and

(Testimony of Joseph Brantley.)

parts of ice cream containers and hoops and so forth. Did I understand you to say you picked those up in the attic?

A. I didn't pick them up. I only saw them brought out of the attic.

Q. They were brought out of the attic?

A. That's right.

Q. Now, I want to get this right. Besides the stepladder that goes into the attic, somebody had packed up the stepladder and into the attic, waste baskets, ice cream cartons, and what else had they stored away in the attic? A. Soldering iron.

Q. Was the soldering iron connected to anything?

A. The fire had done such damage actually I couldn't be sure. I know it was in the attic. [80]

Q. Whose soldering iron was it?

A. That I don't know.

Q. Does anybody know?

A. Not that I know of.

Q. The soldering iron that belongs in the Kotzebue Grill and that has always belonged there, in the Kotzebue Grill, was there at the time of the fire and is still there, isn't that correct?

A. Yes.

Q. How long, approximately, in your judgment, would you believe it would take to pack all this paraphernalia and stash it away in the attic?

A. To my judgment, the way things were arranged, I believe it could be accomplished in a matter of thirty minutes. Maybe twenty-five or thirty.

(Testimony of Joseph Brantley.)

Q. Now when you discovered the fire, all of this stuff was still left intact so somebody could find it, wasn't it? The chair, cases of fruit and waste baskets upstairs, everything was left right out there in plain sight under where the fire was?

A. That's right.

Q. Nothing had been concealed? A. No.

Q. You testified on direct examination that at the time of the fire, the lights had been blown out by a short, by a short circuit. Where did that short circuit occur?

A .In the attic where the fire was. I am not an electrician and I did not run it down to see where the short was. There was so much—the extent of the damage in there. [81]

Q. All right. How did you know the short circuit occurred in the attic?

A. I said I wasn't sure where it occurred.

Q. What was the type of electricity in that attic?

A. It was old type wiring, very old wiring throughout the whole building.

Q. In fact it was known as knob and tube and BX. You are the maintenance man of that building, now isn't it a fact that BX has been condemned in that type of building? A. Yes.

Q. Do you know that BX laying along sawdust or along floors is the most hazardous piece of wiring there is?

Mr. Hermann: I object to Counsel's statement and——

(Testimony of Joseph Brantley.)

Mr. Crane: He says he is the maintenance man.

The Court: Yes. But not an electrician, and I doubt if your question is proper cross examination.

Mr. Crane: Very well, your Honor.

Q. (By Mr. Crane): What was your duty as maintenance man?

A. When I say maintenance man, when he hired me they needed a man there because they had trouble with the water pump, and we had trouble with the oil line freezing up, and, you know, stuff like that. It was up to me to get them operating properly, and functioning again.

Q. All right, he had trouble with the oil lines and fuel pump. Didn't he also have trouble with electrical equipment?

A. Not to my knowledge. There was no direct trouble; it was just that it was poorly wired, which anyone could see. [82]

Q. You say it was poorly wired. Was it hazardous?

A. Well that would be up to REA to decide.

Q. All right. Didn't you know of your own knowledge that it was condemned by REA?

A. Yes. They closed it down.

Q. Then you know the wiring was faulty all over the building? A. Yes.

Q. Now let's come back to another subject for a minute, Mr. Brantley, about these keys. You testified on direct examination there were three sets of keys. All right. Let's account for the three sets of keys.

(Testimony of Joseph Brantley.)

A. Mr. Salinas carried a set; I carried a set; and there was a set locked in the building.

Q. Three sets of keys to all the locks in the building? A. That's right.

Q. Where is your set?

A. Mr. Salinas has them.

Q. Isn't it a matter of fact that a set of keys to that building was found in another man's residence a week after the fire? A. That's right.

Q. How do you account for them being there?

A. They are the keys, I guess, to enter the building which I lost.

Q. Explain, please.

A. The keys to enter the building which I lost; not the set of keys I carried.

Q. Is it those keys which were found on Gene Starkweather's bed in [83] Kotzebue, Alaska,—were they not handed to you and you tossed them back and said you didn't know what they were?

A. They were not.

Q. And then didn't you say later "give me those keys. I believe they are mine"?

A. Mr. Starkweather showed me one key, concealing the other two. We was talking about a key, and he asked me, "Is this the key?" And I said, "No, it isn't." It wasn't shaped like the round key of the type we were talking about. I sat there talking to them all a few minutes and he was twisting them around on his finger, and that's why I identified them, when I saw them on his finger.

Q. You were looking for keys that night, were you not?

(Testimony of Joseph Brantley.)

A. Not those keys; the keys I thought were lost.

Q. You were looking though for keys to get in the building?

A. I had keys to the building in my pocket.

Q. Yes. And Mr. Starkweather had another set of keys to the building? A. That's right.

Q. And that's two sets of keys?

A. That's right.

Q. What did the other square key fit?

A. The juke box.

Q. Did you use the juke box key that night?

A. No.

Q. Are you sure of that?

A. I am sure of it. [84]

Q. As a matter of fact, in your conversation there with Mr. Starkweather you said the reason you were looking for the keys was because you wanted to get the key to the juke box so you could get in and get the money out of the juke box? Is that correct? A. Yes, that's right.

Q. All right. You didn't, but you wanted to, is that right? A. Yes, I wanted to.

Q. You didn't have the key to the juke box on your own set of keys?

A. Not the key to the juke box, no.

Q. What became of the key to the juke box?

A. I don't know what became of it.

Q. What became of the money out of the juke box?

A. I don't know; I never obtained the key to get into it.

(Testimony of Joseph Brantley.)

Q. Didn't Mr. Starkweather find a key that night that would fit the juke box? A. No.

Q. You are certain of that. A. Certain.

Q. You are absolutely certain that the key of the juke box wasn't on that set of keys found on Gene Starkweather's bed?

A. Absolutely.

Q. All right. Didn't you just testify that a square key was the key to the juke box?

A. No.

Q. All right. What did you say? [85]

A. I said the key that fit the juke box was round and the key that he had was square, a square-shaped key, and wouldn't work.

Q. Who had it? Where did you eventually find the key to the juke box? A. I never did.

Q. Now coming to this upstairs, back to the upstairs room again, you talked this morning about going in and out of the attic. I will ask you if it isn't a fact—first, I will ask you this: You have examined this attic and have been up there?

A. I was in the attic, yes.

Q. Did you make any examination of it, either before or after the fire?

A. No, not an examination. The only thing I went in for was just to see the extent of damage that the fire did.

Q. How large did you say that room was?

A. Twenty to twenty-five feet maybe, square.

Q. Isn't it a fact it's a little smaller than that really? A. Yes, it could be.

(Testimony of Joseph Brantley.)

Q. All right. I will ask you this: If between the back room, which you call a storeroom, and the front end of the building, if throughout the attic and ceiling, if the whole business isn't bulkheaded off and that separates those off solid? Do you know what I mean by "bulkheaded"?

A. Yes, I know what you mean.

Q. Isn't that room bulkheaded off?

A. I know there are some 2x6's in there but I think you can get around them.

Q. You think. Do you know? [86]

A. I am not positive.

Q. You wouldn't say it was not bulkheaded off?

A. I would say it wasn't sealed off.

Q. As a matter of fact, you say it wasn't sealed off? A. Yes.

Q. When you first went in there, was there smoke or fire? A. Yes.

Q. No, I said smoke or fire?

A. There was both.

Q. Was it principally smoke, or was it principally fire?

A. Well, I had already threw a considerable amount of water on it, which caused a greater amount of smoke but there was still fire going, it was still burning.

Q. When you first went in there was the fire confined to the roof?

A. It seemed to be in between, rolling in between. She was suffering from lack of draft.

Q. The reason it was suffering from lack of

(Testimony of Joseph Brantley.)
draft, was it not on account of being bulkheaded off?

A. No, I don't think that would affect it; if the other attic trap door had been removed, then it could have created a draft which would have been impossible to put the fire out.

Q. All right. The other trap door wasn't removed? A. No, it wasn't.

Q. And if the other trap door had been removed it would have created a draft and the draft would have created additional fire? [87]

A. Or if I had been five minutes later it could have burned the building.

Q. All right. Now describing the building as this: It's a long building—we will take these two positions here (indicating). The back end, we will say, is the storeroom; the center here consists of two bedrooms, the toilet and so forth; this is the front room used for utility room and office. Now if I understand you correctly—we will say that this is the front of the building on Kotzebue Sound—we are looking toward the rear of the building (indicating). Now I want you to point out to the jury and explain just what part of the building that fire was set.

A. I didn't get your plan too good on the building.

Q. All right. We will put it this way. We are both familiar with the building. Now we will take it this way: we will call these two here (indicating), the sides of the building, between these two

(Testimony of Joseph Brantley.)

posts. Up where you and his Honor are sitting is the front room used for the office and the general room, the large room. That is Kotzebue Sound, the street out there. A. Yes.

Q. All right. We come back here about in this portion and we have a hallway coming through here (indicating). We have Mr. Salinas' bedroom and over here is the bedroom of Charlie Norton and on this side the toilet and storeroom (indicating). Is that correct so far?

A. That's right.

Q. All right. Then we come on back, say about this area, and then we have the rear room of the building, do we not? A. That's right.

Q. Then, if I am correct in your testimony, we have the trap door—the trap door would be [88] about in this position here, would it not (indicating)?

A. If you were standing in the center of the room it would be about here (indicating).

Q. Is the trap door in the center of the room or a corner of the room?

A. The center of the room.

Q. Are you sure of that? A. Yes.

Q. Isn't it a fact that the trap door is in that corner of the room?

A. No. It's in the center of the room.

Q. All right. We will put it in the center. The trap door is in the center of the room here?

A. That is correct.

Q. Then with all of this building, all of the

(Testimony of Joseph Brantley.)
front of the building, all of the downstairs of the building, the platform that was built up for the purpose of setting the fire was put in the far end of the last room of the building, upstairs directly under where I am pointing? Is that correct?

A. Will you repeat that again.

Mr. Hermann: Objected to, if your Honor please, as a double question.

The Court: It is proper cross examination.

Mr. Taylor: He has already stated that the trap door was in the building, in the room.

The Court: Just a moment now.

Mr. Crane: The photograph will show it.

The Court: You should base that type of question on the testimony [89] rather than change it. Objection sustained because it is not based on the witness' precise testimony.

Mr. Crane: Very well. I will have to ask the witness a couple of more questions.

Q. (By Mr. Crane): Mr. Brantley, this rear room back here, did that extend the width of the building? A. Yes, it did.

Q. Then the two bedrooms are here—correct me if I am wrong. Now as you walk down the bedroom, Mr. Salinas' bedroom is on the right going this way (indicating). The bedroom, as we call it for the purpose of this question, Charlie Norton's room would be on my left. When I walk through this place here (indicating), I am coming into the rear room, am I not?

A. That's right.

(Testimony of Joseph Brantley.)

Q. All right. That room extends from wall to wall does it not? A. Yes, it does.

Q. Now correct me if I am wrong when I say, according to your testimony then, the trap door would be about here, would it not (indicating)?

A. A little more to the left of the doorway.

Q. This way? A. The other way.

Q. The trap door would be about in this position (indicating)?

A. About the center of the room.

Q. About the center of the room. All right. Now as I understand your testimony, in the center of this rear room there was a platform built—now [90] let me precede that question. Do you know what was stored in the front room?

A. Yes. I know most of the items that were there.

Q. Was it the staple groceries and stuff of that kind? A. Yes.

Q. Now I believe you stated that in this back room beside the chair there was a case of jam on it, and a case of jam that was used as a stepladder to get up on it. Was it usual to store jam and commodities in the rear room, or had they been stored in the front room?

A. No, they were normally there.

Q. Normally in the back room? A. Yes.

Q. Which part of the back room? Would it be the storage for staple groceries?

A. Well, the staple groceries would have been in the front room and this stuff was stored in the

(Testimony of Joseph Brantley.)

back; dried beans and toilet tissue, and he had this jam sitting along the north side of the building up against the wall.

Q. Now in order to build up this platform the jam would have to be moved from the north side of the building out to the center of the building to build up this so-called step ladder? A. Yes.

Q. It would have to be carried to the chair?

A. Yes.

Q. Now where was the chair in that room, or did the chair come from another room?

A. The chair was in the room. [91]

Q. That chair was placed directly under the so-called vent in the attic, wasn't it? A. Yes.

Q. Now what else was down there beside the chair and the two cases of jam?

A. A five-gallon can, partially—mostly empty, of blazo fuel.

Q. You say mostly empty?

A. A gallon in it or two. About a gallon in it—is close enough. Maybe a little less.

Q. And that was where?

A. That was sitting about maybe a foot away from the chair, maybe six or seven inches.

Q. And at the time you went up the stairs to the fire that five gallon can of gasoline was still sitting in the middle of the floor for somebody to find, wasn't it? A. It was there.

Q. There was no comment about it?

A. No, there wasn't.

Q. Now——

(Testimony of Joseph Brantley.)

Mr. Crane: Did your Honor wish to take a recess at this time?

The Court: We did not get started until 2:15, so I had in mind that we could run until 3:15 and take a little longer recess, if that is agreeable.

Mr. Crane: I am starting another subject, is the reason I inquired. [92]

Q. (By Mr. Crane): Now Mr. Brantley, you were questioned by the District Attorney about the business conditions of the restaurant, about the supplies, the amount of business and so forth, carried on in the restaurant. Did I understand your testimony correctly to say that business had fallen off during that time of year?

A. Yes, business was slow.

Q. Is there anything—have you worked in restaurants before? A. Not commercially.

Q. You say you have lived in Kotzebue two years, and you are acquainted with the town business conditions and the people of the town more or less, are you? A. Considerably.

Q. Isn't it a matter of fact that along in the middle of winter business conditions are always slow in Kotzebue?

A. Well, depending — last winter there wasn't too much slack business there because of the Western and Federal Electric men that were in town for the Site.

Q. But in December of 1957, were there any construction crews or anybody like that boarding or eating at the restaurant?

(Testimony of Joseph Brantley.)

A. Well there was **** Construction Company. We were feeding his men, and there was three or four from that to six that were eating in there, and they left before this thing occurred.

Q. They left before? A. Yes.

Q. Then at the—correct me if I am wrong—you said that just before [93] Christmas time business had slacked off? A. Yes, it had.

Q. Now what was your reason for saying that? Was there anything unusual about business slacking off at that time of year?

A. Well I can tell by my meals that have been put out, whether they are served or not.

Q. Well, what I say is, that didn't business slack off all over town? A. Well, I don't know.

Q. You were merely running a restaurant? If you know—what I am getting at is, is there anything unusual about a lack of business at that time of year?

A. Well in my own opinion I don't think there is anything unusual about it, although for the past two years, from the way I understand, there had been a booming business in Kotzebue.

Q. I am not interested in what you understood before you left, Mr. Brantley. Wasn't it your testimony that the stock was getting low and they were letting the stock run down? Isn't that a normal thing to do when business gets slack—to let the stock get low and replace it in the spring when the boat comes in? Is there anything unusual about that?

(Testimony of Joseph Brantley.)

A. Yes, it is very unusual, especially for Mr. Salinas, due to the fact that he liked to keep the place well stocked. He always had it well stocked ever since I can remember. Why I can remember even all during the winter months he always had supplies coming in.

Q. How much supplies did he have in there at that time approximately? In dollars?

A. I wouldn't know how to estimate it? [94]

Q. I will ask you, isn't there still a thousand pounds of meat still in the freezer?

A. Yes, there is meat that has been there quite awhile.

Q. I say, isn't there approximately a thousand pounds? A. I would say about that.

Q. All right. How long would a thousand pounds of meat run a restaurant there, in your opinion, at that time? That particular restaurant, the Kotzebue Grill. How long would it take them to eat up a thousand pounds?

A. It would take quite awhile.

Q. All right. Is that a shortage of supplies?

A. You couldn't count just supplies. You got to take into consideration fresh vegetables.

Q. I am not talking about that. Taking one thing at a time. Now a thousand pounds of meat, how long would it take them to eat up a thousand pounds of meat?

A. It would take a long time.

Q. A long time. All right. You talked about stuff

(Testimony of Joseph Brantley.)
being stored upstairs. How many sacks of dried beans were upstairs?

A. Two 100 lb. sacks.

Q. Two 100 lb. sacks. How often do you serve beans in the restaurant?

A. We never did serve any dried beans that were there. These were sacks that had never been opened.

Q. You still had 200 lbs. to feed people if they wanted something to eat?

A. Well, if they wanted to order beans I guess we could serve them.

Q. How long would it take in a restaurant of that type to use up 200 lbs. of beans? [95]

A. I don't know. It would take a long time.

Q. All right. We've got a thousand pounds of meat in Mr. Salinas' restaurant, and 200 lbs. of beans. How many cases of jam have we got stacked against the wall in the back room?

A. The minimum would be twelve cases.

Q. Twelve cases of jam. Those are big gallon-size cans, are they not? A. Yes.

Q. Twelve cans, I believe, to a case—or are there six?

A. There are six, I think. I think there are six cans to a case.

Q. All right. That would be how many cans of jam?

A. How many cans of jam—that would be about seventy, approximately.

Q. About seventy cans of jam. How long would it take to use that up? A. About a year.

(Testimony of Joseph Brantley.)

Q. All right. Now how many cases of corn was there out in the front room?

A. I really don't know.

Q. Approximately?

A. The way the stuff was mixed up there—there could have been eight cases of corn, six No. 10 cans.

Q. Six No. 10 cans of corn. A No. 10 can of corn will run you what, one day or two days?

A. We was having a lot of spoilage on corn, and being such large cans and our business had slacked off, and when you opened a can you would have a lot of waste.

Q. All right. Then you wasn't using corn?

A. Not too much. [96]

Q. All right. How many cans of vegetables did you have?

A. Beets and string beans and green peas and stuff like that. Just the amounts I couldn't tell you, but we had ample supply of canned goods.

Q. An ample supply of canned goods. Then there was no shortage of canned goods and no shortage of meat?

A. Only in your hamburger line.

Q. Only in hamburger. You could grind hamburger if you wanted?

A. Do you want us to grind our T - bone steaks up?

Q. You had T-bone steaks on hand?

A. Yes.

Q. How many T-bone steaks did you have approximately?

(Testimony of Joseph Brantley.)

A. Well, there was a lot of them, quite a few.

Q. In other words, you had enough to run a restaurant for about three or four months without ordering anything?

A. No—not in operating a restaurant like we operated there. We served our soups and salads and deserts. You had to have vegetables.

Q. All right. Let's get down to the soups. What did you make your soups out of?

A. It depended on what type of soup.

Q. Well, did you have any macaroni there?

A. Yes. And we had rice, spaghetti, noodles; we had split peas and, well, any kind of stuff like that.

Q. Now, you are a cook. Doesn't that all make pretty good soup?

A. Sure it makes good soup.

Q. All right. How much butter did you have in the joint? [97]

A. We had an ample supply of butter; just exactly how much I don't remember.

Q. Well, you had plenty of butter to run on?

A. Yes.

Q. How about eggs?

A. We had a bunch of eggs but they were going bad on us.

Q. Is that when you sold a couple of cases to Ferguson, that you got rid of after Steve left for Outside?

A. Well, he would have got rid of them if he had been there.

Q. All right. Now we have got down to that.

(Testimony of Joseph Brantley.)

How much did you have in the line—did you have all the condiments necessary, like salt, pepper, spices?

A. Yes, we had that. But tomato catsup, chili sauce—we were short on tomato catsup.

Q. One shortage.

The Court: Well, now, counsel, would be a good time for a recess. We have been in session about an hour. Perhaps the jury would appreciate fifteen minutes recess. If you will try and be prompt—because I know some of you would like to get a cup of coffee.

(Thereupon the Court duly admonished the jury and a fifteen minute recess was taken.)

After Recess

(At approximately 3:30 p.m. court reconvened and the trial of the cause was resumed. The witness on the stand at time of recess resumed the stand for further cross examination. Both counsel stipulated that all jurors were present.) [98]

Q. (By Mr. Crane): Now, Mr. Brantley, coming back to a few more questions regarding the supplies in the building, approximately how much flour did you have?

A. We got our flour from Rotman's as we needed it.

Q. How about sugar?

A. Sugar was the same way.

Q. Ordered from Rotman's as needed?

(Testimony of Joseph Brantley.)

A. Yes.

Q. How about milk?

A. Milk came the same way.

Q. Do you know, when you ordered that from Rotman's, whether you ordered that from Rotman's or you ordered it from restaurant supplies that were at Rotman's store?

A. We ordered it; we just took the order down there and they would fill it and we would pay for them out of the till.

Q. Did you know there were between eight and ten thousand pounds of staple commodities belonging to the Kotzebue Grill stored at Rotman's?

A. I did not.

Q. Now Mr. Brantley, coming back to this depleting of the stock—you are familiar with the restaurant business I believe you stated—isn't it usual to let stock be depleted at the end of the year for yearly inventory?

A. Yes, stock that is not perishable, that will keep.

Q. In other words then, the only thing was lacking to keep this restaurant in operation for months to come was a few perishables? Isn't that correct?

A. Perishables and hamburger meat. [99]

Q. Perishables and hamburger. Couldn't you get hamburger at Rotman's at any time?

A. You had to put in an order in advance. Several times we had put in orders.

Q. The only thing, in your testimony, that was holding up operations, was the shipment of hamburger that hadn't come?

(Testimony of Joseph Brantley.)

A. Hamburger and fresh vegetables.

Q. And you absolutely had to have that before you could operate the restaurant?

A. The way Mr. Salinas required, that's the only way we could operate.

Q. You don't know whether the type of weather, time of year, shipping conditions and weather, conditions of that kind may have held them back?

A. The orders weren't sent in by the usual channels.

Q. You went up and examined the records?

A. No. ACS brought the records down for us to examine.

Q. At whose request?

A. Esther Ipalook and myself.

Q. Who is Esther Ipalook?

A. She is the lady who works there.

Q. Is she the manager or are you the manager?

A. Well neither one of us were given full authority until right at the last moment. Mr. Salinas turned it over to me right at the last.

Q. Somebody was running the place, weren't they? A. Mr. Salinas was in every day.

Mr. Crane: I would like to have this marked for identification, plaintiff's Exhibit No. 1. [100]

The Court: Do you mean defendant's Exhibit?

Mr. Crane: Pardon me; I mean defendant's Exhibit.

Mr. Hermann: I wonder if I might see it counsel.

(A photograph is given to Mr. Hermann and then returned to the Clerk.)

(Testimony of Joseph Brantley.)

(A photograph is marked as defendant's Exhibit 1 for identification.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 1 and ask you to say whether or not this portrays the scene of the back room where the fire occurred? A. Yes. That looks like it.

Q. Calling your attention to this photograph, I will ask you to examine carefully the upper structure that is shown, where the 2 x 4s run to the peak of the roof, and tell me whether you can notice the crown of the roof?

The Court: Counsel, hadn't you better offer it in evidence first.

Mr. Crane: Very well. At this time I will offer it in evidence. I may say at this time it's the same photograph that Mr. Hermann has.

Mr. Hermann: We have no objection to its being offered; it's the same thing.

(Defendant's Exhibit 1 is received into evidence.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 1 and ask you to examine that [101] carefully, examine that photograph and see if it shows the roof of the building?

The Court: The roof of the building?

Mr. Crane: The inside of the roof of the building; perhaps I should have used the word ceiling.

The Court: You meant ceiling?

Q. (By Mr. Crane): I meant what I want you to show, Mr. Brantley, is when you look through the trap door from the ceiling, looking up where

(Testimony of Joseph Brantley.)
the 2 x 4s come together, I want you to point out where the crown of the roof meets.

A. Oh, I see. It would meet just a little to the left of this picture. The picture was taken at an angle like that (indicating), giving a different view and effect of the actual scene than if you were standing underneath. If you were standing underneath you could see the crown directly.

Q. Then I take it from your testimony that is not a true picture of the inside of the room.

A. Well, it's a true picture, but it could be deceiving.

Q. In what way is it deceiving?

A. From the angle of the picture, it is shaped so you would think that the picture is not taken directly under the trap door.

Q. You would think it was not taken directly under the trap door?

A. I would say not; that it wasn't.

Q. If it had been taken under the trap door, would it have shown the joists?

A. Well, you may have to look a little to the left in there.

Q. As a matter of fact, from that picture it shows that the trap door is not in the center of the room, does it not? [102]

A. I will say it is closer to the center of the room than it is to either wall.

Q. That's better. Now coming back — to illustrate—you have been in that room lots of times. When you walk in you walk in this way to the

(Testimony of Joseph Brantley.)
room (indicating), and you have a couple of beds on this side and canned goods on this side (indicating), and you walk on ahead, and isn't it a fact that that vent or hole in the room is over here (indicating), and not in the center of the room?

A. Well, as I stated to you before, I don't know if it was in the exact center of the room or not.

Q. Isn't it closer to the end wall and the side wall than it is to the center of the room?

A. I don't think so; I wouldn't say so.

Q. Now, do you know whether it is in the center of the room or it is not?

A. I would say it is closer to the center than to either wall.

Q. Closer to the center than to either wall?

A. Yes.

Q. While I think of it, some pictures by Floyd Land were introduced in evidence. Floyd Land took those pictures at whose request?

A. I didn't ask him who; I happened to be a witness to him taking the pictures. It was a nice day and he was having trouble with the camera due to the fact that it was so cold, and he was shaking, but he finally took enough that they came out all right.

Q. What business did Floyd Land have down there taking pictures, if you know? [103]

A. Well, I don't know.

Q. Don't you know that Floyd Land is an enemy of the defendant in this case, and made the statement in Kotzebue that he was out to get him?

(Testimony of Joseph Brantley.)

A. He definitely is not an enemy.

Q. How do you know that he is not.

A. Because when he was released by Mr. Salinas, he was brought back in there on his own free will at his own request to do odd jobs, and if he had been an enemy of Mr. Salinas due to his dismissal there he wouldn't have come in and worked for him later.

Q. Don't you know of your own knowledge that if a person, anybody in Kotzebue would color a photograph of that place, it would be Land?

Mr. Hermann: Object to the form of the question, if your Honor please.

The Court: It is argumentative. Objection sustained.

Mr. Crane: Very well, your Honor.

Q. (By Mr. Crane): Now coming back to another thing, Mr. Brantley, you say to get up into this attic, you could pull yourself up and climb up in the attic from the so-called stepladder that was built and left there?

A. Yes, it could be done.

Q. What was the condition of the attic?

A. It was pretty well burned.

Q. No. I mean prior to the fire. I beg your pardon.

A. Prior to the fire I wasn't in the attic, so I couldn't tell you.

Q. How long a pull would it be for a man—to approximate—we will [104] take a chair the height of one of these ordinary chairs, and on top of it a

(Testimony of Joseph Brantley.)

case of No. 6 cans, and a man stood on the case of No. 6 cans and chinned himself and pulled himself up in the attic, would he in doing that naturally disarrange his clothing and get into a certain amount of dust and dirt?

A. That I wouldn't know because I didn't see the attic before the fire. After the fire you couldn't help it because of the charred and burned debris laying around.

Q. A very old place isn't it?

A. Yes. Just how old I don't know.

Q. And there is sawdust insulation laying up there on top, inside of the trap door, and a man getting up there would naturally get sawdust and so forth on his clothing?

A. Depending on how careful he was.

Q. Loose sawdust. How far away from the opening were the containers? The ice cream containers?

A. I couldn't answer that because I didn't see the material until it was brought out of the attic, but from where the marshal was standing inside of the attic I could see his shoulder and side.

Q. What did the marshal use to go up in the attic? The same paraphernalia that was there?

A. No. He used the same arrangement less one case.

Q. What? A. Less one case.

Q. Less one case? A. Yes. [105]

Q. Then he reached in there and pulled out a waste basket, the remains of a waste basket?

A. Just the bottom part of it.

(Testimony of Joseph Brantley.)

Q. Now according to your direct testimony, the last time you saw that waste basket was where?

A. Well, the last time I saw it Mr. Adirim had it.

Q. Prior to the fire I should say.

A. Well now I couldn't tell you, because the waste basket was made of cardboard which burned, all except the bottom, and I couldn't swear on the waste basket at all.

Q. All right, then you don't know whether there was a waste basket in the attic or not. You testified on direct examination that they found the bottom of a waste basket in the attic. Now I am asking you how do you know it was the bottom of a waste basket? Or do you know? Could it have been a pie tin?

A. No. This was egg-shaped, and no pie tin was shaped that way.

Q. What was egg-shaped?

A. The bottom of the basket.

Q. How do you know it was the bottom of a waste basket, or could it have been something else?

A. I never saw an object like that except a waste basket.

Q. All right. You had never been in the attic of that building, you say? A. No.

Q. Approximately how long has that building been built?

A. I couldn't say; I don't know when the building was built. [106]

Q. Do you know who previously owned it?

A. I think Archie Ferguson owned the building.

(Testimony of Joseph Brantley.)

Q. Archie Ferguson. And he owned it prior to Steve Salinas? A. That's correct.

Q. And you noticed the trap door going into the attic? A. Yes.

Q. Do you have any idea what was stored in the attic? A. Not previous to the fire, no.

Q. Do you know whether anything is stored up there?

A. No. There was no storage there from what I saw after the fire. There had been some water barrels in there but whether they were used to supply water downstairs, that I wouldn't know.

Q. Then you don't know of your own knowledge whether the remainder of the so-called waste basket had been up there one day, one month or one year, do you? A. No, I didn't.

Q. All right. Now we will come to the ice cream containers. They have been selling ice cream in the restaurant for many years haven't they?

A. Since I have been there they have been selling ice cream.

Q. Since you have been in Kotzebue or since you have been in the restaurant?

A. Yes, since I have been in Kotzebue.

Q. All right. Do you know of your own knowledge what was in those ice cream containers when they were put in the attic? Do you know? I am asking you? [107]

A. If there had been anything in those containers except liquid, it would have been exposed, unless it was paper or something like that.

(Testimony of Joseph Brantley.)

Q. Wouldn't rags burn? That's what I mean, something inflammable.

A. Metal bottoms, nuts something like that, would be exposed.

Q. If it had been clothing it would have burned, wouldn't it. A. I imagine it would.

Q. You have testified they found three hoops. Now how do you know those hoops came off of ice cream containers?

A. Because they are identical.

Q. All right. Are those same kind of hoops on any other kind of containers?

A. Not that I have ever seen.

Q. Is ice cream only put out in cardboard containers with that type of hoops on it?

A. The only type I ever saw.

Q. But you don't know yourself? There could have been other cardboard containers?

A. I couldn't be positive; there are too many different things made, but nothing I ever saw.

Q. All right. Was any ice cream stored upstairs?

A. Definitely not.

Q. All right. Where in the building was these ice cream containers?

A. The ice cream containers, or the containers with ice cream were in the freezer.

Q. All right. That's fine. Now to get those containers in the— [108] Is it your testimony that somebody would have to go down and take ice cream out of the ice cream freezer, up along the outside door, going outside, up the steps, and go on

(Testimony of Joseph Brantley.)
back to the back end of the building and put it up in the attic to get the container there?

A. Not if they had been put in the attic previously.

Q. All right. That's what I am asking you, or do you know? A. No, I am not sure.

Q. How much of your testimony are you sure of?

The Court: Counsel, you do not give the witness full opportunity to answer.

A. I know Mr. Salinas had asked us to save these containers for him and wash them out and put them in the freezer in the back there. And we saved three I think.

Q. That's ordinary procedure in a restaurant, isn't it? To save containers to ship stuff in?

A. I don't know. I think there was one container that was empty and slid under the bed of Charlie Norton's room.

Q. Do you know how it got there?

A. I have no idea.

Q. Do you know what purpose it was used for?

A. I have no idea.

Q. Was there any refuse in it?

A. Nothing. It was a clean container.

Q. That was in Charlie Norton's room?

A. Underneath the bed. [109]

Q. How long had it been underneath the bed?

A. I have no idea.

Q. All right. What else was up there in the attic that had been in other parts of the building?

(Testimony of Joseph Brantley.)
What else was brought down from the attic besides the hoops and the remains of the waste basket?

A. A soldering iron.

Q. What type of soldering iron?

A. Well, it was burned. I didn't see the head part of it; the part I saw was the cylinder that goes inside of the iron, the igniter.

Q. Wasn't it a complete iron?

A. Well I never saw the outside.

Q. What did you see?

A. I just told you; I saw the inside of the iron.

Q. How do you know it was the inside of an iron?

A. I never saw anything else with a set-up like that, and I know it was the inside.

Q. Hasn't it been a custom for years for Ferguson to have all kinds of tools, soldering irons and paraphernalia, everything else laying around his place? Haven't you found it scattered all over the restaurant there?

A. No. Charlie Norton, the way he had the tools and everything was arranged neatly.

Q. I am not talking about Charlie Norton; I am talking about Archie Ferguson.

A. I don't know about it.

Q. Are you trying to tell the jury that the soldering iron had been put up there this time, the time of the fire or had it been there for months or weeks? [110] A. Due to the fact——

Q. Never mind "due to the fact," just answer my question, would you.

(Testimony of Joseph Brantley.)

A. Well I am not trying to tell them; I know what was brought out of the attic.

Q. All right. That's better now. As a matter of fact, Mr. Brantley, you haven't any personal knowledge of anything in the attic, have you? All you know is just that the marshals packed this stuff out and showed it to you, isn't that correct?

A. That's right.

Q. You have no personal knowledge of any of this? A. Not prior to the fire.

Mr. Crane: That's all.

Redirect Examination

Q. (By Mr. Hermann): Mr. Brantley, do you know whether or not there was a light switch in the room under the trap door to the burnt part of the attic?

A. No. There was not, to my knowledge.

Q. Was there any switch anywhere in the building that controlled that room?

A. Yes. There was a switch before you go into the room in the little pantry there.

Q. Could you describe how it was located in relation to the door of the room?

A. Yes. It was to the right of the door facing; and it was a regular flip switch, a wall switch, toggle type I think they call it.

Q. Do you know what fixtures, if any, there were in that room, electric fixtures? [111]

A. Only the light fixtures, and I think there were four of them.

(Testimony of Joseph Brantley.)

Q. Four? A. Four or five maybe.

Q. How far away were they from the trap door?

A. A couple of feet one of them was I guess; two or three feet to the best of my knowledge was the closest.

Q. Do you know whether or not it was that premises that were condemned by the Electric Association?

A. I talked to the REA manager at the station, and he came in and told me he was going to shut my power off. He said that he had filed a record notice that he gave Mr. Salinas to have the place rewired six months in advance, or a year; I am not sure which.

Q. When was it shut down, the place, as you say?

A. After the fire occurred. It was January 4 or 5, around there.

Q. Do you know whether or not any repairs had been made to the electric circuit after the fire?

A. Yes. Harold Little—We kept getting this short up there after the fire, and he went up there and cut the wire some way so we could have lights in the rest of the building. He cut out the short there.

Q. Were there any lights remaining in that portion of the building?

A. Yes. There were lights there.

Q. I mean the portion of the building where the fire was.

A. No. There were no remaining lights there.

(Testimony of Joseph Brantley.)

Q. Were there any after Mr. Little cut the circuit? A. No, there weren't. [112]

Q. Do you know how far from the room it was that Mr. Little cut the circuit?

A. He cut the circuit just about over the door of Mr. Salinas' room.

Q. I see. Mr. Brantley, during the time that you were cooking there, what was the main item sold by the restaurant? The main item of food.

A. Well at this point business had dropped off to where we was selling a lot of sandwiches, and we had a few dinners.

Q. What kind of sandwiches did you sell?

A. Well, we sold a lot of ham sandwiches and hamburgers and cold beef sandwiches.

Q. Will you tell us just what those sandwiches were made out of?

A. Hamburgers, you have hamburger patties. You use lettuce, tomato and hamburger relish.

Q. How about the other sandwiches?

A. They were served about the same way.

Q. Did all these sandwiches have fresh vegetables in them? A. Yes.

Q. Do you know about how high the ceiling in that back room is?

A. Eight or nine feet high. Eight or nine feet—I am not sure of the exact measurements.

Q. Did the Grill ever, at any time, receive any hamburger from the Rotman Store?

A. Not while I was there.

Q. Do you know of any repairs that building was in need of prior to the fire? [113]

(Testimony of Joseph Brantley.)

A. Yes. It was in need of several repairs.

Q. Had you ever discussed any of these repairs with Mr. Salinas? A. Yes.

Q. Which repairs?

A. Just before he left we discussed putting new plywood in his room and fixing that up, and he wanted me to paint the dining room part.

Q. What did he say in regard to putting plywood in his room?

A. Well I asked him—some of the plywood had bulged, you know—and I asked him if he wanted new plyboard in there, and he said to suit myself.

Q. When was it that conversation took place?

A. That was the day before he left.

Q. Had he ever said anything to you before the fire about making repairs to the building?

A. No, there was nothing said before the fire.

Mr. Hermann: No further questions.

Recross Examination

Q. (By Mr. Crane): Between the time that Kotzebue Electric served the notice to Mr. Salinas regarding the electric current and the date of the fire, was there any repair work done in the restaurant, electric repair work, I mean?

A. The only electric repair that was done, Harold Little did it, and I think it was a matter of just knocking out a short circuit in another area.

Q. I think you misunderstood my question. I mean after the notice, before the fire, not after the fire. Was there any electric repair work done in there, any new wiring or anything?

(Testimony of Joseph Brantley.)

A. Not while I was there, there wasn't any.

Q. Do you happen to know, of your own knowledge, speaking of these four lights in the back room, do you happen to know one was out and there was a short circuit in the back room?

A. Your back room lights were never used. We always used a flashlight, or what have you, because there was no bulbs in them, and the main wall switch that you use going in, when that is off position, then you have no hot wire in the back room.

Q. Do you know though, that there was a short circuit in the back room?

A. No, not until after the fire.

Q. You don't know whether there was one there before the fire or not? A. No, I don't know.

Q. If there had been one there would you have known it? A. No, I wouldn't.

Q. While you are on the witness stand I would like to have these marked for identification. Defendant's 2, 3, 4, 5 and 6 and 7 marked for identification.

Mr. Crane: They may be marked as a group, or whichever is more convenient.

Mr. Hermann: May I see those first, Mr. Crane.

(The photographs are shown to Mr. Hermann.)

(A group of photographs are marked for identification as defendant's Exhibits Nos. 2, 3, 4, 5, 6, 7.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 2 for identification and ask you to examine that and tell me what it is. [115]

(Testimony of Joseph Brantley.)

A. It's part of the interior of the room where the fire occurred.

Q. I hand you defendant's Exhibit No. 3 for identification and ask you to tell me what that is.

A. That's a front and side view of the Kotzebue Grill.

Q. And defendant's Exhibit No. 4 for identification and I will ask you what that is.

A. That's looking at the main entrance, the front and downstairs part of the Kotzebue Grill.

Q. Defendant's Exhibit No. 5 for identification. Will you please tell me what that is?

A. That's looking from the front room in the hallway, going to the back room.

Q. Is that upstairs or downstairs?

A. Upstairs.

Q. That's upstairs? A. Yes.

Q. And defendant's Exhibit No. 6 for identification?

A. That's from the back side of the building, giving a back end effect in the north side of the building.

Q. And defendant's Exhibit No. 7?

A. That's the stairway going to the upstairs part of the Kotzebue Grill, and the platform.

Mr. Crane: At this time, your Honor, I offer in evidence defendant's Exhibits Nos. 2 to 7 inclusive. I have already introduced defendant's Exhibit No. 1. [116]

Mr. Hermann: No objection.

The Court: They may be received.

(Testimony of Joseph Brantley.)

(Defendant's Exhibits Nos. 2 to 7 incl. are received in evidence.)

The Court: Of course it is really not proper cross examination, but it doesn't matter.

Mr. Crane: Well, I should have identified them earlier. That's all I have.

The Court: Well, the witness may be excused unless you have something, Mr. Hermann.

Q. (By Mr. Hermann): Were any of those pictures, pictures of the interior of the rear room?

A. Only one.

Q. Could you point that out.

The Court: I think you mentioned that as No. 2.

Mr. Crane: Here is No. 1. I don't know whether that was shown to the jury or not. That was identified as a part of the rear room.

(There were no further questions and the witness was excused from the stand.)

WHITTIER WILLIAMS JR.

is then called as the next witness for the plaintiff, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name.

A. Whittier Williams Jr. [117]

Q. How old are you? A. 21.

Q. Where do you live? A. Kotzebue.

Q. Were you living in Kotzebue during the month of December, 1957? A. Right.

Q. Do you know a building known as the Kot-

(Testimony of Whittier Williams Jr.)

zebue Grill at Kotzebue? A. Right.

Q. Do you recall whether or not you were at the Kotzebue Grill on the 25th of December, 1957?

A. In the place?

Q. Yes. A. No.

Q. Were you near the place?

A. I was near the place, that's right.

Q. About what time?

A. About near midnight.

Q. How did you happen to be there, Mr. Williams?

A. Well, I was at the pool hall, Pete Lee's——

Q. Pete Lee's pool hall. How far is that from the Kotzebue Grill? A. It ain't too far.

Q. Pardon me?

A. It ain't too far from Pete Lee's pool hall.

Q. Is it a block or more than a block?

A. I think it's a block, or even less than a block.

Q. What did you see when you got to the Kotzebue Grill. What was the first thing you saw?

A. You mean when they hollered fire or something?

Q. Where were you when they hollered fire?

A. I was at Pete Lee's pool hall.

Q. What did you do after that?

A. After—you mean while I was in there?

Q. After you heard them holler fire.

A. I went out.

Q. Did you go to the Grill at that time?

A. That's right.

Q. What was the first thing you saw when you got to the Grill?

(Testimony of Whittier Williams Jr.)

A. I seen some boys and the side door.

Q. What boys were those, do you recall?

A. No. There was too many. I didn't have time—I was excited too.

Q. Do you recall whether or not you saw Joe Brantley? A. Yes.

Q. Where was Joe Brantley when you saw him?

A. I went in, at the side door; there was lots of boys, and I didn't make out all their faces but they were in there. He came in, Joe Brantley, to get the key; he looked for it and found it.

Q. Where did he find it?

A. Probably hanging on——

Q. Did you see him find it?

A. I know he get it. [119]

Q. What did you do after he got the key?

A. We went out from the place, and there is a side entrance——

Q. A side entrance? A. That's right.

Q. Was that an upstairs entrance or downstairs? A. Yes, upstairs.

Q. Did you go upstairs with him?

A. That's right.

Q. Do you know whether or not the upstairs door was locked? A. It was locked.

Q. Who opened it? A. Joe opened it.

Q. What happened after Joe opened the door?

A. We went in there.

Q. Where did you go inside?

A. Inside after we opened the door.

Q. Yes?

(Testimony of Whittier Williams Jr.)

A. We went through the door, and there is, I mean there is a hall or something.

Q. I see. A. We went to the back room.

Q. What did you see when you went in the back room?

A. We didn't have time to look around, just for the fire.

Q. I mean after you entered the back room, what did you see?

A. It was dark; there was no lights. [120]

Q. Do you recall whether the door to the rear room was open or closed?

A. It was open all right.

Q. Did you see anything at all in that room?

A. You mean going to the room back there where there was the fire in the back room? After we went into the little back room?

Q. Yes.

A. There was a chair and two cases of canned goods.

Q. And where was the chair in the room?

A. Right underneath the door of that attic.

Q. Was there anything else in the room besides the chair and the two cases?

A. A five-gallon Blazo can.

Q. Would you describe the Blazo can to us please. A. Tell you what it looked like?

Q. Yes. A. A regular five-gallon can.

Q. Did it have a cover? A. No.

Q. Where were these two cases of canned goods that you saw?

A. Right on top of the chair.

(Testimony of Whittier Williams Jr.)

Q. Were they one on top of the other?

A. That's right.

Q. What did you do after that?

A. We started trying to stop the fire.

Q. What did you, yourself do? [121]

A. I was holding a flashlight; we were trying to get a light.

Q. What was Mr. Brantley doing?

A. Trying to get some water, but the shower room there was no water. We tried that—no water; only hot water—steam—no water, so they got some fixe extinguishers. I wasn't with them when they got the fire extinguishers but they get them. And after they get the fire extinguishers they drilled a hole in the front of the building, through the ice I mean, and they started hauling water.

Q. How long did the fire last?

A. Well I don't know how long exactly it lasted.

Q. Was it more than an hour or less than an hour?

A. I would say a little more than an hour. That would be my guess anyway.

Q. Did you see Steve down there? Steve Salinas? A. That's right.

Q. Did you see him there?

A. About after fifteen minutes; after we were hustling around he came in.

Q. What was he doing there?

A. Well, he came into the building and looked at the fire.

Q. Did he try to stop it in any way?

A. We try to stop it and he went in.

(Testimony of Whittier Williams Jr.)

Q. Did Mr. Salinas try to do anything to stop the fire?

A. Well he came in and looked at the fire. I believe he go on top of the chair and see how was the fire. I mean how far the fire went. I didn't [122] hear him say nothing though. I mean I was kind of far; I was holding a flashlight.

Q. About how long did he stay at the fire?

A. A pretty good period of time.

Q. About how long?

A. Let's see? I don't know — I don't know exactly how long he stayed.

Q. Did he do anything to fight the fire besides look at it?

A. It was too crowded anyway, people going in and out and everything, trying to stop it anyway. I don't know exactly what he was doing.

Q. How long did Mr. Brantley stay there?

A. Well he stayed as long as I did.

Q. Did Mr. Salinas stay as long as you did?

A. I don't believe so.

Q. Did you see Mr. Salinas throw water or do anything like that? A. No.

Q. How did Mr. Salinas look? Did he seem to be excited or anything?

Mr. Crane: I object to that, if your Honor please. Calling for a conclusion of the witness, how a man looked.

The Court: Objection overruled. He may answer.

Mr. Hermann: Could we have the question read, please.

(The reporter reads the previous question as

(Testimony of Whittier Williams Jr.)

follows: "How did Mr. Salinas look? Did he seem to be excited or anything?")

A. No. He seemed to be calm. [123]

Q. (By Mr. Hermann): Could you tell whether or not the cover to the ceiling entrance was there or not? To the ceiling entrance.

A. You mean the door to it?

Q. The ceiling entrance.

A. It was open when we came in.

Q. Could you see the cover to it at all?

A. No. I believe it was pushed upwards.

Q. Was there anything else in that area that you noticed? A. In the room?

Q. Did you see anything else near the trap door? A. There was a bed, a little cot.

Q. I mean in the ceiling area, near the hole to the attic. A. No—There was a cord.

Q. How long a cord?

A. I don't know how long. I didn't go up to the attic and see how long.

Q. How much was sticking out?

A. Six or eight inches.

Q. Do you recall what color it was?

A. Black.

Q. Now on the floor did you see anything besides the cases and chair? A. The five-gallon can.

Q. Where was the five-gallon can in relation to the chair? How far from the chair?

A. Not too far. It ain't far from the chair.

Q. Did the lights go on at all while they were up there? [124]

(Testimony of Whittier Williams Jr.)

A. They turned the switch on once, but I believe there was a short circuit in that little place there, in that little room, and they turned them off and we had to use a flashlight.

Q. Do you know how long they stayed on?

A. Just about ten minutes. Maybe a little less than ten minutes. I would say ten minutes.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): Junior, what time of evening did you come to town that night?

A. Late. Pretty near—I went down about 11:30 and sayed at Pete's about a half hour, and about midnight they called "fire."

Q. You hadn't been downtown earlier in the evening or near Ferguson's building or near the restaurant? A. No.

Q. How cold was it that night, Junior?

A. It wasn't too cold. I wore a light jacket, my field jacket.

Q. Well would you say thirty or forty below?

A. That's pretty good. About thirty or forty below, yes.

Q. Now I just wanted to ask you, Junior, about these. Well I will come back to something else. I heard you say something about drilling a hole in the ice. Was that hole in the ice—did you boys drill that so you could get water out of it for your buckets, or did you have the pumper down there that night? A. They carried water in buckets.

Q. You just used buckets in the old fashioned

(Testimony of Whittier Williams Jr.)

way? You didn't get the pumper down to the fire?

A. I didn't go out after I go into the building. I didn't bother to go out.

Q. Now you talked about working up in this hole where the fire was. First, I will ask you about Steve Salinas. They asked you about how he was dressed, I believe. Do you remember how Steve was dressed that evening?

A. He was wearing his down parka and a suit.

Q. You have known Steve quite awhile?

A. That's right.

Q. He was dressed about as he usually dressed?

A. That's right.

Q. Didn't have any rough clothes on, or working clothes, anything of that kind? Just his down parka and a suit, and if he had boots on over his ordinary shoes—like he is dressed now in other words? Is that correct?

A. Well I don't think he was wearing a tie. He wouldn't be wearing a tie that evening.

Q. Now, Junior, where these men were working, putting the fire out, up in where the trap door goes up into the attic, did I understand you to say you formed a bucket brigade, and you were trying to get water up there?

A. Yes. They used buckets, and some fire extinguishers.

Q. How big is that opening up there approximately? A. Just right for a man to climb up.

Q. Just right for a man to climb up?

A. That's right.

Q. Would there be an opportunity for more than

(Testimony of Whittier Williams Jr.)

one—for instance, if you were packing water to me and I was handing it to somebody, there probably wouldn't [126] be room for more than one would there? A. One guy up there.

Q. And one guy packing to him?

A. That's right.

Q. Only one guy working in the fire; there wasn't room for Steve or anybody to get in there and help? A. No.

(There were no further questions and the witness was excused from the stand.)

ABRAHAM KOWUNNA

is then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and Jury your full name.

A. Abraham Kowunna.

Q. Where do you live, Mr. Kowunna?

A. Kotzebue.

Q. How long have you lived there?

A. Four years now.

Q. Were you living there last December?

A. Yes.

Q. Do you recall where you were on the night of December 25?

A. I was in Pete Lee's pool room.

Q. What time did you arrive at Pete Lee's pool room, about? A. About nine o'clock. [127]

(Testimony of Abraham Kowunna.)

Q. About how long did you remain there?

A. Not more than a half hour.

Q. Was there any particular reason you left at that time? A. Somebody was hollering fire.

Q. What did you do when you heard somebody holler fire? A. Run out.

Q. Where did you go?

A. To that restaurant.

Q. Do you know the name of the restaurant?

A. Yes. Kotzebue Grill.

Q. What was the first thing you saw when you got to the Kotzebue Grill?

A. I talked to Joe; I saw Joe first.

Q. Joe who? A. Brantley.

Q. Where was he when you saw him?

A. Getting buckets.

Q. Where was he?

A. Right next door, Ferguson's.

Q. Ferguson's store? A. Yes.

Q. Where did he go from there?

A. Right to the Grill.

Q. What part of the Grill?

A. Downstairs, getting some water.

Q. Did he go in the downstairs? [128]

A. Yes.

Q. Did you go in with him?

A. Not at that time.

Q. How long was he in there?

A. Not more than ten minutes.

Q. What did you do after Joe came out?

A. Followed him right upstairs.

(Testimony of Abraham Kowunna.)

Q. Where did you go upstairs?

A. Where the smoke was coming out.

Q. Do you know which end of the building that was? A. Yes.

Q. Which end was it?

A. Right at this end (indicating).

Q. That would be the back end or the front end of the building? A. The back end.

Q. Could you see the fire? A. No.

Q. How far back did you go in the building?

A. It was pretty long, so we had to go all the way back.

Q. Did you go in the back room? A. Yes.

Q. What did you see in the back room?

A. Smoke coming out of the attic and the fire.

Q. How could you see in the attic?

A. You could see the flames. [129]

Q. Was there an opening to the attic?

A. Yes.

Q. Did you see anything else in that room?

A. Yes. A five-gallon can of Blazo.

Q. Where was the five-gallon can of Blazo?

A. Right next to the two cases of something that was stacked up.

Q. Where was that located?

A. Right under the attic.

Q. Well, what did you do after that?

A. We started pouring water—hauling water up there.

Q. Where did you get the water?

A. They made a hole in front of the restaurant.

(Testimony of Abraham Kowunna.)

Q. In the ice? A. Yes.

Q. Now do you know what happened to the chair and the can of Blazo while the fire was going?

A. Somebody else must have taken them out.

Q. Do you know who took them out?

A. No.

Q. Now did you smell anything in that back room?

A. No, not while we was working—we could smell the smoke.

Q. Were you ever in that room after the fire?

A. Yes.

Q. About when was that?

A. About five days later. [130]

Q. Were you alone or were you with someone?

A. Yes.

Q. Who were you with?

A. Three marshals.

Q. What did you smell on that occasion?

A. Gas.

Q. Where did you smell the gas?

A. Right where the attic was.

Q. Whereabouts in relation to the opening into the attic? A. Not too far.

Q. Did you see anything in the opening to the attic at the time of the fire?

A. I didn't get that.

Q. Did you see anything in the opening from the room to the attic at the time of the fire?

A. No.

Q. You didn't see anything at all? There wasn't

(Testimony of Abraham Kowunna.)

anything in that opening?

A. There was flames; that's all I saw.

Q. Were there any objects there?

A. I seen a cord hanging down.

Q. How long a cord was that?

A. I don't remember.

Q. Do you remember what color it was?

A. Yes.

Q. What color was it? A. Black. [131]

Q. Did you see Mr. Salinas at all during the fire? A. Yes.

Q. Go ahead.

A. He was helping down there with the buckets.

Q. How long did he stay there? Do you know?

A. No.

Q. Was he there as long as you were?

A. I don't remember.

Q. Did you notice whether Mr. Salinas seemed excited or calm, how he appeared?

Mr. Taylor: Just a minute, your Honor. That's calling for a conclusion as to appearance and state of mind.

The Court: Same ruling, counsel. The same ruling. I am referring to the matter of observation, not opinion or conclusions as a matter of law. He may answer.

Q. (By Mr. Hermann): How did he appear at the fire? Was he calm or excited, or just how did he appear? A. Calm, I guess.

Q. Do you know whether or not he stayed until the fire was out?

(Testimony of Abraham Kowunna.)

A. No. I didn't watch that time.

Q. Did you see Mr. Brantley during the fire, while you were fighting it?

Mr. Crane: Leading and suggestive, if your Honor please, suggesting the answer.

Q. (By Mr. Hermann): Did you — would you state whether or not you saw Mr. Brantley [132] during the fire?

A. Yes. I was working with Mr. Brantley.

Q. What kind of work was he doing?

A. I was passing water to him.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): What time did you come down town Christmas, do you remember?

A. I don't remember.

Q. You don't know how long you had been around Pete Lee's prior to the fire?

A. How long in where?

Q. How long you had been around Pete's prior to the fire?

A. Not more than just before show time.

Q. Since just before show time?

A. That's when they start the show time, I go to Pete Lee's.

Q. Then you remained there all evening?

A. Yes.

Q. The show started about what time, about seven or seven thirty up there? Is that right?

A. 8:15 on Sundays and Wednesdays 8:15, and it would be 8:15 Christmas.

(Testimony of Abraham Kowunna.)

Q. And it would be 8:15 Christmas?

A. I guess so.

Q. If you remember, did this fire occur after the show was out or was the show still going on when the fire occurred?

A. The show was still going on. [133]

Q. The show was still going on when the fire occurred? A. Yes.

Q. As I understand your testimony then, a bunch of you boys were over at Pete Lee's and someone called in and hollered fire and then you all went over to Steve Salinas'? A. Yes.

Q. Was there a crowd at the fire before you boys got there from Pete Lee's—How many of you were there? A. I don't know, six or five of us.

Q. Five or six of you from Pete's went over to the restaurant and the restaurant was on fire?

A. Yes.

Q. You say that was probably just before the picture show was out? A. Yes.

Q. That would make it around ten or 9:30?

A. About nine o'clock.

Q. About nine o'clock? A. Yes.

Q. Well didn't the fire occur later than nine o'clock? A. After nine I guess.

Q. After nine? A. Yes.

Q. Did you see when you went there—the District Attorney asked you if Steve was calm or excited. How long have you known Steve Salinas?

A. I know him since he came down there. [134]

Q. I will ask you, did Steve act any different

(Testimony of Abraham Kowunna.)

around the fire than he acted around the restaurant and at any other time.

A. He acted quite calm.

Q. Didn't show any undue excitement?

A. No.

Q. I wonder if you can describe for me—did you see in the room where the fire was—you say that you were fighting the fire up in the attic—where was that hole in the attic? Closer to one wall, the center of the room, or about what part of the room was the trap door that goes up in the attic?

A. The end of the room to that side (indicating).

Q. The end of the room to that side? More in the corner of the room? A. Right.

Q. Now I will ask you, the night of the fire, you testified there was a box on top of a box. There was a case of canned goods along side of the chair. There was another case of canned goods, and I believe a Blazo can on the floor. I will ask you this: Did you see, was all that left out in the open, in plain sight, so you could see it all right in front of you?

A. Yes. It was all left out in sight.

Q. All left out in plain sight? A. Yes.

Q. This cord that you say was coming out of the attic, you say it was about a three inch cord, or three or four inches exposed?

A. I don't know.

Q. You never personally examined the cord?

A. No. [135]

(Testimony of Abraham Kowunna.)

Q. You don't know of your own knowledge, do you, whether it was connected with anything or whether it was just something hanging down, or just what it was? A. No.

Q. Was the marshal there at the fire that night?

A. Right after that, yes.

Q. After the fire? A. Yes.

Q. But he wasn't there at the fire?

A. I don't remember that.

Q. I mean, did you see him around in the room where you were fighting the fire? A. No.

Q. Didn't see him in evidence? A. No.

Q. Did you see Gene Starkweather or Tommy Goodwin? A. I didn't see Gene.

Q. Did you see Tommy? A. Yes.

Q. That was in the upstairs room where you was fighting the fire? Tommy Goodwin was up there?

A. Yes.

Q. Were you up there when Harold Little disconnected, or put the lights back on so you could fight the fire? A. That time I was outside.

Q. You were helping outside? A. Yes.

Q. Now when you first came downtown early in the evening from up where you live, did you come down—so the jury will understand what we mean—there is a street running up and between the postoffice and the restaurant toward the bay, is there not?

A. Toward the bay, Kotzebue Sound.

Q. What I mean, this street that runs between the Kotzebue Grill and the postoffice, runs out to-

(Testimony of Abraham Kowunna.)
wards Rexfords (indicating), like this. Here is the Bay out here (indicating), and here is Front Street (indicating), and here is Pete Lee's place over here (indicating), is it not. A. Yes.

Q. All right. When you came downtown did you come down this way (indicating), or did you come down the waterfront to get to Pete's?

A. Right along the waterfront.

Q. Did you come down around eight o'clock at night, something like that?

A. A little earlier than that I guess.

Q. All right. When you came down the waterfront, you came from what part of town, did you come down past the postoffice part, the Grill, or turn up to Pete Lee's, or come up the other way, or just how?

A. Down the waterfront, right by the postoffice and Pete Lee's.

Q. And turned at the postoffice? A. Yes.

Q. All right. When you made the turn at the postoffice, looking over toward the Kotzebue Grill, was the place open or closed at that time of night?

A. There is no light in it.

Q. No lights. Now did you get a chance to look at the complete picture? Did you get a chance to look at the front room upstairs when you was walking along, the front room facing Kotzebue Sound?

A. No.

Q. Did you see any lights upstairs when you came along? A. No.

Q. If there had been lights upstairs would you

(Testimony of Abraham Kowunna.)
have seen them, ordinarily? A. Sure.

Q. Then the upstairs part of the place was dark at the time you came along there? A. Yes.

Q. You say Steve was up there helping you at the fire? A. Yes.

(There were no further questions and the witnes was excused from the stand.)

(Thereupon, at 4:50 p.m., the Court duly admonished the jury and adjourned for the day.)

Be It Remembered that at 10:00 a.m., April 23, 1958, court reconvened and the trial of this cause was resumed. Defendant was present together with counsel Mr. Taylor and Mr. Crane; the Government was represented by Mr. Russell R. Hermann; the Honorable Walter H. Hodge presiding. [138]

The Court: We will resume the trial this morning in the case of United States vs. Salinas. I expect we had better call the roll of the jury.

(The roll of the jury was then called; all jurors were present.)

The Court: We will proceed with the Government's case.

SAM HENRY

is then called as the next witness for the plaintiff, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Henry, would you please tell the Court and jury your full name?

(Testimony of Sam Henry.)

A. Sam Henry.

Q. Could you speak a little louder, please.

A. My name is Sam Henry.

Q. Where do you live? A. Kotzebue.

Q. Could you speak a little louder.

A. Kotzebue.

Q. Were you living there last December?

A. Yes.

The Court: Pardon me. Just a moment.

Q. You say you were living in Kotzebue last December? A. Yes.

Q. Were you at the Kotzebue Grill last December 25? A. Yes. [139]

Q. About what time did you go to the Kotzebue Grill? A. Well I was kind of late.

Q. I am having trouble hearing you.

A. It was kind of late when I got there.

Q. About how late, do you know?

A. I don't remember what time.

Q. Where were you just before you went over to the Grill?

A. Well, I was running a movie for the guys.

Q. I am having trouble hearing you again.

A. I was running a movie for Ray.

Q. Do you know whether it was after the picture or before the picture that you was over there?

A. Well, we had two reels—just when it ended.

Q. I can't hear you at all. Would you speak up a little bit. Would you repeat that, please.

A. Just on the last reel.

Q. What time is the last reel usually over?

(Testimony of Sam Henry.)

A. Somewhere after ten.

Q. What did you do when you got to the Grill?

A. I started helping them guys passing water.

Q. Were these people there when you arrived at the Grill? A. Yes.

Q. Where were you at when you were helping pass the water? A. Well, I was on the hall.

Q. What? A. I was on the hall. [140]

Q. While you were there, did you at any time see Mr. Salinas? A. He came around later.

Q. He came in later? How much later?

A. I don't know; I don't remember.

Q. Where were you when you saw Mr. Salinas?

A. Well, I was passing water right on the hall there.

Q. In the hall? A. Yes.

Q. Did Mr. Salinas say anything at all that you heard?

A. Well, he said, "It's too far gone now. Let it burn" or something like that.

Q. Would you repeat that please.

A. He said, "It's too far gone now. Let it burn" or something like that.

Q. What did you do after he said that?

A. Well, we kept passing water.

Q. How long did it take to put out the fire?

A. I don't know how long.

Q. Did you see Mr. Salinas fight the fire?

A. No. Just stand there.

Q. Pardon me?

A. He just stand there.

Mr. Hermann: No further questions.

(Testimony of Sam Henry.)

Cross Examination

Q. (By Mr. Crane): When you speak of the hallway, Sam, which hall do you mean? The hallway upstairs between the rooms, or the hallway downstairs? [141] A. Upstairs.

Q. You say that you didn't see Steve Salinas until after the fire had started?

A. He got there later.

Q. Do you know whether or not he was downstairs before, thawing out pipes so you could get water? A. I don't know.

Q. Where did you get the water from so you could fight the fire?

A. Well, they were packing it from downstairs.

Q. Downstairs in the building or downstairs outside? A. I don't know.

Q. The water was being packed in large buckets or small containers or what?

A. There was some small and large buckets.

Q. Who was packing water to you?

A. There was a bunch of guys there.

Q. Now while they were passing the water, how long had the fire been going on before you saw Mr. Salinas?

A. I don't know. He came in just before the fire went out.

Q. In other words, Mr. Salinas came in just before the fire went out? A. Yes.

Q. Now at that time, didn't he say, Sam, "There is no need of fighting any more. We have it smothered out"? A. No.

Q. Isn't that what he said? [142] A. No.

(Testimony of Sam Henry.)

Q. Didn't he say there was no need of packing any more water?

A. No, I didn't hear him say that.

Q. How long did you remain around the fire?

A. After the fire went out, I went home.

Q. Do you know or not that Steve Salinas was downstairs after he talked to you? After he talked to you, did Steve Salinas go on downstairs?

A. I don't know.

Q. Do you know whether, when you talked to him, he had been in the hallway, whether he had been downstairs or had come up and was talking to you in the hallway? A. No.

Q. You don't know whether Mr. Salinas, prior to your conversation with him about the fire, was working in the lower part of the building with a blowtorch to see if they could get the water lines thawed out downstairs?

Mr. Hermann: If your Honor please, I object to the form of the question. He has repeated it three times.

The Court: Well that is permitted to a certain extent in cross examination. He may inquire.

Q. (By Mr. Crane): You may answer the question Sam. Was he thawing it out so they could get water to the fire? A. I don't know.

The Court: Will you speak up a little. We cannot hear you.

A. I don't know that. [143]

Q. (By Mr. Crane): How was Steve dressed that night?

A. Oh, he was dressed with his——

(Testimony of Sam Henry.)

Q. A little louder.

A. He was dressed up pretty nice.

Q. "He was dressed up pretty nice", is that your answer? A. Yes.

Q. When you say he was dressed up pretty nice, what did he have on? Just what did you observe? I just want to test your memory.

A. Well he had a parka on.

Mr. Crane: That's all.

Mr. Hermann: No further questions.

(There were no further questions and the witness was excused from the stand.)

CLARENCE GREGG

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Gregg, would you please tell the Court and jury your full name.

A. Clarence Gregg.

Q. Where do you live, Mr. Gregg?

A. Grace Taktu's place.

Q. Where is that? What town?

A. You mean where I come from?

Q. Yes. A. Kotzebue. [144]

Q. How old are you? A. 18.

Q. Were you living in Kotzebue last December?

A. Yes.

Q. Do you recall where you were on the evening of December 25? A. Yes.

(Testimony of Clarence Gregg.)

Q. Where were you that night?

A. Daniel Stockers.

Q. Do you know what time you went to Stocker's? A. What?

Q. Do you know what time you first went to Stocker's that evening?

A. No. I was there all evening.

Q. Did you arrive early in the evening or late in the evening?

A. I was there early in the evening.

Q. Do you know what time you left Stocker's?

A. No.

Q. What did you do when you left Stocker's?

A. That's when Margie Lincoln came in and said the restaurant was on fire.

Q. Do you know what time that was?

A. No.

Q. How far is Stocker's from the Kotzebue Grill?

A. It's right on the same street, going right straight down, and you go to the restaurant.

Q. About how many blocks, if you know? Do you know?

A. Well here is the restaurant (indicating), and you go up the street and right at this corner there is Dan Stocker's place. [145]

Q. What did you do when you got to the Grill Building? What did you first do?

A. They were forming a line up to the roof; that's where I went.

Q. Up to the roof? A. Yes.

(Testimony of Clarence Gregg.)

Q. What did you do up by the roof?

A. I wasn't by the roof: I was down by the door, by the next building, right between the restaurant and Ferguson's store.

Q. I see. What did you do there?

A. Well, I was passing water to the next guy.

Q. Where was the water coming from?

A. Ferguson's store.

Q. I see. Could you see them throwing the water on the roof? A. Yes.

Q. Was it having any effect that you noticed?

Mr. Crane: I object to that, if your Honor please. It's incompetent, irrelevant and immaterial, what effect it was having.

The Court: I cannot see where it would be either incompetent, irrelevant or immaterial. Which do you mean?

Mr. Crane: It's immaterial what effect it was having on the fire.

The Court: Wait a moment now. Maybe it is immaterial.

Mr. Hermann: I think it goes to show the state of the fire at the time he was there.

Mr. Crane: The man said he was downstairs and passing water upstairs. [146]

The Court: I do not think upon reflection that it is material.

Mr. Hermann: It would go to the state of the fire at the time he was there.

The Court: Do you propose to show whether there was a fire?

(Testimony of Clarence Gregg.)

Mr. Hermann: No. To show what the state of the fire was when he was there, how long the fire may have been burning, to show how hot the roof was. He was one of the first ones there.

The Court: Well I didn't have in mind that there was any dispute there as to whether there was a fire. But now, as to whether, when the fire was first noticed, whether it was hot, and had been burning——

Mr. Crane: Well, if your Honor please, this witness has not shown that he was in position to know.

The Court: I still can't see the materiality of it, counsel.

Mr. Hermann: Very well.

Q. (By Mr. Hermann): How long did you stay in that place beside the building?

A. Until the boys said they couldn't turn off the fire from the roof.

Q. What did you do then?

A. Some of us boys was going upstairs to the next floor.

Q. To the next floor?

A. Yes. To the second.

Q. What happened after you went upstairs to the next floor?

A. Some of the boys were going to break down the door, but Joe Brantley came along and opened it. [147]

Q. What did you do after it was opened?

A. There was some boys ahead of me and I went in; they were way ahead of me.

(Testimony of Clarence Gregg.)

Q. How many boys? A. I don't know.

Q. What did you do then?

A. I don't remember.

Q. Well, where did you go then?

A. We went to the hallway, and there was an attic, and some of the boys went through that attic, and the rest of the boys went to the room where the fire was above the ceiling.

Q. Where did you go yourself?

A. I was in the hall entrance.

Q. The hall entrance. Did you go in the back room at all? A. Yes, I did.

Q. What did you see in the back room?

A. I couldn't see anything when I went in there first.

Q. Did you see anything later on?

A. Yes, after the fire.

Q. What did you see then?

A. There was a cord hanging down from the attic.

Q. What kind of cord?

A. One of these cords they used for—something like they use for coffee pots.

Q. How long a cord was that? [148]

A. About this long (indicating).

Q. Just exactly where was that cord, Mr. Gregg?

A. Hanging down from a corner of the attic.

Q. In what room would that be?

A. That was in the back room.

Q. I see. Now while you were up there did you see Mr. Salinas?

(Testimony of Clarence Gregg.)

A. While I was in the hallway.

Q. Do you recall whether or not he said anything at that time? A. Yes.

Q. What did he say?

A. He said "let it be. It's too far gone" when we were fighting the fire.

Q. How long after that was it before the fire was out? A. It was right in the middle.

Q. What did you do after the fire?

A. Steve said for us to clean up the place.

Q. What did he say to you in that respect?

A. He said for us to clean up the floor, get it clean, and he said he would pay us.

Q. What, exactly, did he say in that respect.

A. I don't remember.

Q. Do you recall whether or not any mention was made of the wiring? A. What?

Q. Do you recall whether or not he made any mention of the wiring?

A. No. Oh—yes. He told us—the wiring in the attic—he told us [149] to put the wiring about 16 inches apart.

Q. Did you do that? A. Yes.

Q. While you were in the attic did you detect any smell at all?

A. Not while I was in the attic, I couldn't smell anything.

Q. While you were fighting the fire?

A. Yes.

Q. What could you smell?

A. When we went in we could smell some gasoline.

(Testimony of Clarence Gregg.)

Q. I see. While you were working in the attic did you remove anything from the attic to any of the other rooms?

Mr. Crane: I object to that as leading, your Honor.

The Court: I think not; it does not suggest the answer. Objection overruled.

A. I don't remember.

Q. (By Mr. Hermann): Were any of the wires disconnected or removed from the attic?

Mr. Crane: That is objected to, if your Honor please, as immaterial and incompetent, unless it is first shown that he knows or that he moved them.

The Court: Well if the inquiry is whether he knows I think it would be proper.

Mr. Crane: There is nothing in evidence, your Honor.

The Court: You may answer whether you know whether any wires were removed. [150]

A. Yes. We threw a whole bunch of wires out.

Q. Where did you throw them?

A. On the beach.

Q. On the beach?

A. Yes. There is a bank-like on the road. We threw them outside the road.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): Clarence, so we can clear this up a little bit, I will hand you defendant's Exhibit No. 7 and ask you to look at that and see if you recognize it?

(Testimony of Clarence Gregg.)

A. That is the stairs up to the building.

Q. Now from that picture does that portray the part of the alley between the Ferguson building and Steve's restaurant? A. Yes.

Q. Now, then, as I understand your testimony, the water that was coming, was coming from the Kotzebue Mercantile across and into the Kotzebue Grill? Is that right, Clarence? A. Yes.

Q. And the water system was working in Ferguson's then? A. Yes.

Q. And you were getting water from Ferguson's and passing it through? A. Yes.

Q. Another thing I wanted to bring out, you say you were fighting the fire on the roof, at the fire at first? A. Yes. [151]

Q. That's the attic roof isn't it, Clarence?

A. There is a crack in the roof that they poured water in.

Q. Is that where the smoke was coming from?

A. Yes. There was some flames out of it.

Q. And you were pouring water in that crack, you boys from Danny Stocker's place? You were doing that?

A. There was boys from all over.

Q. How long was you fighting the fire on top of the roof before Joe Brantley come and opened the door to let you on the inside?

A. I didn't see him——

Q. You don't know how long? A. No.

Q. I take it from your testimony, Clarence, that for awhile you were pouring water on the roof be-

(Testimony of Clarence Gregg.)

fore you could get into the upstairs. Is that the way it was? A. Yes.

Q. And then after the door was opened, you started fighting the fire from the inside of the building? Is that correct? A. Yes.

Q. Now, if you can, point out to the jury, explain to the jury, from this photograph just where the entrance to Ferguson's would be in conjunction with the stairway to the building.

A. It would be right about here (indicating).

Q. Then you were bringing water across from Ferguson's and up this stairway after you could get in the building? [152]

A. Yes, there was some boys doing that; I was inside.

Q. In other words, you organized what we usually call in Kotzebue a bucket brigade?

A. Yes.

Q. Did you later on get a hole in the ice and start bringing water from down in the bay or down in the Sound, do you remember?

A. I don't remember.

Q. You handled the entire fire then by buckets and hand methods? What I mean, Clarence, where was the city pumper that night, our fire wagon up there?

A. I think it was up at Harold Jackson's place.

Q. Did it get down to the fire at all, as far as you know? A. No.

Q. It didn't get down there. Pretty cold that night, wasn't it? A. Yes.

(Testimony of Clarence Gregg.)

Q. If it did get down there, you fellows had the fire under control by bucket brigade prior, didn't you?

A. Yes. We had fire extinguishers too.

Q. Where did you get them?

A. They got them from all over the place; they just grabbed all the extinguishers available. They got them from Ferguson's, Alaska Airlines.

Q. Where else?

A. I don't know where else.

Q. Now while you were up there the fire was all confined to the rear room of the building in the attic, was it not? [153] A. Yes.

Q. No fire in any other place of the building?

A. You know the rear room in the hallway—there was another room that was on fire too, of the attic.

Q. Where it had broken through?

A. There was a back building up there and there is that room in the hallway. They have a hall up there about that high (indicating) and it was burning around there.

Q. In the attic, in the upper part of the building? A. Yes.

Q. The District Attorney asked you about some wires. What were those wires? Were they twisted wires, single strand or double wires, or just what kind of wires were they, if you remember?

A. I don't remember.

Q. You know Harold Little, the electrician, do you not? A. Yes.

(Testimony of Clarence Gregg.)

Q. Wasn't it he who cut off the wire and rearranged them so you could get lights in the building? A. Yes.

Q. You spoke about this wire hanging down through the trap door. Was it connected to anything, or do you know?

A. Let's see. I don't know if it was connected with anything. It was hanging down and one of the boys grabbed it and pulled it off.

Q. You don't know whether it was tied into terminal or other wires or what? [154]

A. What?

Q. You don't know whether it was connected into any other wires or tied into any wires? In other words, you know nothing about it except that it was a loose wire and it was pulled down?

A. Yes.

Q. These wires that you threw out—were these the wires that Harold Little cut off?

A. I don't know which ones he cut off. There was Claude Wilson there. He was up with Harold Little, I think.

Mr. Crane: That's all of this witness I think.

Redirect Examination

Q. (By Mr. Hermann): Do you know when it was that the fire extinguishers were brought?

A. No.

Q. Were they there when you first started fighting the fire upstairs? A. What's that again?

Q. Were they there when you first started fighting the fire upstairs? If you know?

(Testimony of Clarence Gregg.)

A. Unh-nuh. We had the buckets up there first; next they got the fire extinguishers, next they started using the fire extinguishers.

Q. Do you know where it was that Mr. Little cut these wires? A. What's that again?

Q. Do you know where it was that Mr. Little cut the wires? A. No.

Q. Where were you at the time he cut them?

A. I think I was warming up inside Steve Salinas room. [155]

Q. Then you didn't see Mr. Little cut the wire?

A. There was Claude Wilson up there with him I think.

Q. You don't know what room it was they were cut in?

A. In the hallway room I think. Yes, the second from the rear.

(There were no further questions and the witness was excused from the stand.)

HAROLD LITTLE

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Little, would you please tell the Court and jury your full name?

A. Harold G. Little.

Q. What is your occupation?

A. Electrician.

Q. Do you have any credentials as an electrician? A. Yes, sir.

(Testimony of Harold Little.)

Q. What type of credentials do you have?

A. Journeyman.

Q. How long have you followed the trade of electrician? A. Since 1950.

Q. Are you still following that trade?

A. Yes.

Q. Have you had any special training as an electrician? A. Yes.

Q. What type? [156]

A. Well, it's been—I went through radio school and through some college.

Q. You studied electronics? A. Radio.

Q. To me that's electronics. Where do you live, Mr. Little? A. Kotzebue.

Q. How long have you lived in Kotzebue?

A. Four years.

Q. Do you know a building known as the Kotzebue Grill? A. Yes.

Q. Have you ever worked in that building as an electrician? A. Yes.

Q. On how many occasions?

A. Oh, a couple of times; a couple or three times.

Q. Over how long a period of time were those two or three times? A. In the last year.

Q. Do you feel that you are familiar with the building as far as the wiring goes? A. Yes.

Q. Will you state whether or not you were in the Kotzebue Grill on the night of December 25?

A. Yes.

Q. Will you state whether or not—how did you happen——

(Testimony of Harold Little.)

A. December 25—the night of December 25, yes I was there.

Q. You say the night and early morning of the 25th and 26th? A. Yes.

Q. How did you happen to go to the Grill on that occasion? [157]

A. I was called out for a fire.

Q. Do you recall what time it was that you were called out for the fire?

A. Around ten maybe; somewhere in there.

Q. Do you recall who called you?

A. Yes. Margie Lincoln.

Q. What did you do when you went to the Grill? What was the first thing you did?

A. Well, I entered on the north door, through the kitchen and through the hallway, and from there straight on upstairs.

Q. What did you do when you arrived upstairs? What was the first thing you did?

A. Well things appeared ordinary at that time; I mean nothing was going on, and I looked, went into the fire area and seen what was going on there and I took it that we couldn't hardly hold the building. I assumed the building couldn't be held.

Q. You mean the fire couldn't be stopped?

A. It didn't look very good. There wasn't very much to do any firefighting with.

Q. Were you able to tell where the fire was, what area? A. Yes.

Q. What area was that?

A. In the attic.

(Testimony of Harold Little.)

Q. Had it spread to any of the lower rooms?

A. No.

Q. What portion of the attic was it in, if you know? [158]

A. It was in the rear of the building.

Q. How big an area did the fire cover, if you know? A. Well I didn't investigate that much.

Q. Would you tell us what you did as far as investigating the fire goes?

A. Well, there are two trap doors there, and I did open the rear door. I was out in the hallway. I opened that and I did receive smoke from there. I closed it. I doubt if anybody even noticed me doing that. That's why I said I didn't think we would save it. It looked like it was spread larger than it actually was.

Q. Do you recall whether or not you saw Mr. Brantley at the time you first arrived at the fire?

A. Yes. He was in the attic.

Q. In the attic? A. Right in the hatch.

Q. Which hatch was that? A. The rear one.

Q. By rear one, do you mean the one in the hallway or in the room? A. In the far end.

Q. In the room? A. Yes.

Q. Now did you see Mr. Salinas about that time?

A. Yes.

Q. Did you talk to him? A. Yes, I did.

Q. What did you say to him, and what did he say to you? [159]

A. I stated that we might get ready to move all the fixtures out, and so forth.

(Testimony of Harold Little.)

Q. Did he say anything?

A. Well no—I mean everything was pretty well confused—a lot of excitement—and I mean you don't wait around to explain things. That was just the point.

Q. Well, do you know whether or not Mr. Salinas did anything to remove the fixtures?

A. No. Because I left at that time, and grabbed some pails and went downstairs to get some more water started there.

Q. To your knowledge were there any fixtures removed?

A. No. But everything was getting ready to be removed.

Q. Who was getting them ready?

A. Well, there was a guard posted and so forth. I mean everything was being organized, I mean.

Q. It takes a few minutes to get things going?

A. Yes.

Q. Well, what did you do for the remainder of the time that the fire was being put out. Just describe it briefly.

A. Well, I went downstairs because somebody said they could get water out of the water barrels downstairs, so I went down there and I relieved Gene Starkweather.

Q. Where was Mr. Starkweather?

A. He was down bailing out water out of the drinking cans. There was four barrels there.

Q. In what room? [160]

A. This was the kitchen area, and they had

(Testimony of Harold Little.)

filled up a garbage can, and I think he went up with it. At least they had gotten that filled up, and I think he was one of them that went up with the garbage can.

Q. Well, do you recall what time it was the fire was finally extinguished?

A. Well not particularly; I mean an hour or hour and a half.

Q. About what time would that make it?

A. Oh, 11:30 to 12:00.

Q. Did you remain after the fire?

A. No. While I stayed around for some time, I did go back to my house.

Q. Were you ever back in the Grill on that night? A. Yes.

Q. About what time was that?

A. Charlie Wilson came over to get me, and Steve told him, for just a few minutes, to get the lights back on in the building.

Q. Then you went there at Mr. Salinas' request? A. Yes.

Q. What did you do in that respect, you say, getting the lights back on?

A. Well, the lights went out during the fire, and I climbed up through the burned area with a flashlight, and there was one native boy with me. I don't recall who he was but I know he was up there with me and I cut two wires off from the burned area.

Q. Where abouts in the building did you cut the wires?

(Testimony of Harold Little.)

A. Well, it would be approximately over the hallway.

Q. Over the hallway? Where would it be in relation to the hallway trap door? [161]

A. About the same—I imagine within five or six feet.

Q. How far would this be from the burned area?

A. Well it would be twelve or fourteen feet. There is a partition in between, a kind of half partition.

Q. Well, would this be on the other side of the partition from the burned area?

A. Yes. The partition is approximately two and a half feet high, and the wires was cut off on that side.

Q. Now do you recall whether or not you saw Mr. Salinas on December 26? A. Yes.

Q. Where did you see him?

A. Well, he was around my place there I know.

Q. At your house? A. Yes.

Q. How far was your house from the Grill?

A. Oh I imagine approximately 225 feet.

Q. I see. When you saw him at your house on the 26th, what was discussed at that time, if anything?

A. Well, they wanted the place rewired, and I said I would help supervise it.

Q. Was anything discussed in regard to the fire itself? A. Well, yes, in general.

Q. What did Mr. Salinas say in that respect?

(Testimony of Harold Little.)

A. Well not too much came up on the 26th.

Q. Did Mr. Salinas give any opinion as to whether or not the fire had [162] been a set fire or accidental fire?

A. Well I couldn't really say. It was assumed that it was set. Everybody assumed that, even that night.

Q. Do you know whether Mr. Salinas assumed that while you were talking with him?

A. That I don't know.

Q. Did he say anything in respect to gasoline or anything of that nature?

A. I don't know if it was on that particular day, but there was a discussion later.

Q. What did he say in that discussion?

A. Well it's—you know—people get together, and I will say my place probably had at least fifty people coming through it during the day, and you know, it's a place where we sit around and talk, everything is discussed.

Q. What did he say?

A. Well I don't recall, I mean exactly.

Q. Do you recall that he had mentioned gasoline?

Mr. Crane: I object to that, if your Honor please. It's leading and suggestive. That's the second time counsel has asked him about gasoline.

The Court: Objection sustained.

Mr. Hermann: The witness hasn't said he has exhausted his recollection.

The Court: The question is leading. Objection sustained. [163]

(Testimony of Harold Little.)

Q. (By Mr. Hermann): Mr. Little, have you given a statement, previously given a statement to the marshal? A. Yes.

Q. In your opinion is that a correct statement?

A. Yes.

Q. Do you think it would refresh your recollection or your memory if you could see that statement?

A. No. I have seen it; I seen it yesterday.

Q. Was there anything in that statement in relation to Mr. Salinas discussing gasoline?

Mr. Crane: If your Honor please, I object. Counsel is cross examining his own witness.

The Court: I doubt if it is cross examination. He is trying to refresh his recollection by way of the statement. He may answer.

A. I think the District Attorney's day is wrong. Let's move up to the next day.

Q. (By Mr. Hermann): All right. What was said on the next day in that respect?

A. Well, Joe was in—that's Brantley—and it was discussed. I mean everything was discussed there and Joe says "well, if Steve done it, he could do a better job".

Q. What did Steve say?

A. Well, Steve did say he could have used a lot more gasoline if it was going to be done. [164]

Q. Do you recall what date that was?

A. At this time I don't know; I think it was the 27th.

Q. The 27th? A. I am not positive.

(Testimony of Harold Little.)

Q. Now did you have any conversation with Mr. Salinas with respect to the wiring after the 26th and 27th? A. Yes.

Q. What was that?

A. To what effect was that?

Q. Yes.

A. Well that was to rewire the place.

Q. And do you know what date that was he discussed that with you?

A. Well the night of the fire and the following day.

Q. Were you hired to rewire the place?

A. I was not. I was just to be supervisor.

Q. You were to supervise it. Who was to do the work?

A. Well, Tommy Goodwin, but of course we were to do it together.

Q. Were any final plans made for that?

A. Yes. We drug out the material and boxes and so forth, and we even took a panel over to the building.

Q. Was any rewiring actually done, to your knowledge? A. No.

Q. Do you know why it was not done?

A. Well Steve left right after that and things were kind of up in the air. [165]

Q. He left?

A. Yes. Things were kind of up in the air and we didn't know what to do.

Q. I see. Let's go back to the 25th of December. Do you recall whether or not you saw Mr.

(Testimony of Harold Little.)

Salinas at any time during that day?

A. Yes. I probably went into the hotel up there about one o'clock.

Q. Do you remember whether you saw him at that time? A. Yes, I did.

Q. Do you recall whether or not you saw him later that day? A. That I don't know.

Q. Where did you go when you finished at the hotel? A. Down at my place.

Q. What did you do then?

A. I went to bed.

Q. Is it possible he could have been in there without your knowing it? In your place?

A. It could have been very possible.

Q. Do you recall whether or not you saw Tommy Goodwin on the 25th day of December?

A. Yes.

Q. Where did you see him?

A. In his place and also mine.

Q. What time did you see him?

Mr. Crane: If your Honor please, I object to where he saw him, Tommy Goodwin, the day after the fire, the 26th.

Mr. Hermann: I intend to tie it in later.

The Court: The materiality does not now appear. However, he [166] says he intends to tie it in later.

Q. (By Mr. Hermann): Do you recall what time it was you saw him at your place?

A. Well, he was in there in the evening.

Q. About what time of evening? To the best of your recollection.

(Testimony of Harold Little.)

A. Well, he came in, I think, just before the fire, and him and Gene went out together.

Q. About how long before the fire?

A. Oh, it must have been twenty minutes. They went over to Stocker's to have coffee.

Q. Do you know whether or not Mr. Goodwin was in your house earlier that day?

Mr. Crane: Objection, if your Honor please. No foundation laid as to what Tommy Goodwin done, where he was or what he did.

The Court: Same ruling. It may be tied in later; if not, it will be stricken.

Mr. Hermann: Would the reporter read the question, please.

(The reporter then reads the previous question as follows: "Do you know whether or not Mr. Goodwin was in your house earlier that day?")

A. That I don't know.

Q. (By Mr. Hermann): Is it possible he could have been in your house without your knowledge?

A. Well I know a lot of traffic came in there; that's nothing unusual for my place. [167]

Q. You are not certain then who may have been in your house on the 25th? A. No.

Q. Do you know where Gene Starkweather was at the time you went to the fire?

A. Well Gene and Tommy left just a few minutes before.

Q. They were together?

A. They were together.

Mr. Hermann: No further questions.

(Testimony of Harold Little.)

Cross Examination

Q. (By Mr. Crane): Mr. Little, referring now to the Kotzebue Grill building, owned on Christmas day by Steve Salinas, what was the electric service —to start with a preliminary, what was the electric service into that building?

A. That was a four-wire system, three phase.

Q. Four wire, three phase? A. Yes.

Q. Now coming into the building, does it come in off a transformer into the building?

A. Transformers. Three of them.

Q. Branch transformers? A. Yes.

Q. Now the wire into the building, is it generally stranded, three wire, or single wire, or just explain to the jury what the wiring in the building is.

A. Well, this is an old building, and actually the wiring is very, very poor. Way under code.

Q. Do you know the carrying capacity of the wire in the building? What is your voltage?

A. Well, your three-phase is 110, 220, or whatever you want off of it.

Q. What—will that serve?

A. That up there I believe is 7200.

Q. 7200? A. Yes.

Q. Were there any other buildings served on this same circuit?

A. Yes. Off the transformer there is a pole— I would say the whole end of town, I would say, is off of that.

Q. All right. Now we will get down to grips with what type of service entrance was used into

(Testimony of Harold Little.)

the Grill? Explain if there is a switch there.

A. Well, this was a haywire set up. You have got a four-wire system and no conduit coming in. It was just more or less wrapped together and shoved out the building and hooked on. Then you have three meters, single phase meters, for three phase power.

Q. Is there any neutral or any ground?

A. Yes. You have to have a neutral, and your ground is the same.

Q. There is at that building such?

A. Yes.

Q. Now coming up to the building, what type of fuses were there in the building? In the fuse box, what amp?

A. Well they were plug in fuses and I think they were 30 amp.

Q. Now, Mr. Little, after getting a general idea of the building, coming to the upstairs of the building and getting near the area of the fire, [169] I want you to tell the jury what kind and type of wiring there was in that attic.

A. Well, you have two types of wiring up there; part of it is tube and knob. That is your distribution to your tube and knob wiring. From there it backs off into what you call BX, which is a very poor type of installation.

Q. Now did you notice any BX wiring in that attic? A. Yes.

Q. Did you notice after the fire whether the BX cable had the insulation burned off?

(Testimony of Harold Little.)

A. Yes, it was burned.

The Court: Counsel, now would be a convenient time for a recess, if you don't mind taking a recess.

(Thereupon, at approximately 11:00 a.m. the Court duly admonished the jury and recessed for ten minutes.)

After Recess

(At approximately 11:10 a.m. court reconvened and the trial of the cause was resumed. All necessary persons were again present and both counsel stipulated as to the presence of the jury. The *defendant* on the stand at the time of recess resumed the stand for further cross examination.)

Q. (By Mr. Crane): Mr. Little, I will hand you defendant's Exhibit 1 and defendant's Exhibit 2, which have been introduced into evidence as showing part of the interior of the back room. I want to call your attention to the plug-in sockets, and I will ask you to examine them and ask you if you are familiar with them? [170]

A. Yes.

Q. Do you know whether there were any female plug-ins in either one of those sockets?

A. I don't know.

Mr. Crane: I would like to have this marked for identification. If your Honor please, and Mr. Hermann, that is a book I have borrowed. I wonder if certain parts of it could be substituted if it is introduced in evidence and it could then be withdrawn.

(Testimony of Harold Little.)

Mr. Hermann: The electrical qualifications you can take judicial notice of.

The Court: Yes, but the jury cannot take judicial notice; only the Court can do that.

(A book, the National Electrical Code, is marked for identification as defendant's Exhibit No. 8.)

Q. (By Mr. Crane): Mr. Little, I will hand you defendant's Exhibit No. 8 for identification and ask you to examine that and please tell me what it is.

A. Well, it is the National Electrical Code handbook.

Q. Briefly explain to me just what is that book and how it is used by electricians.

A. That is a code book set up by national underwriters, and it is what we go by to make wiring safe.

Q. To do a safe job of wiring you are required to follow that code, are you not? [171]

A. Yes.

Mr. Crane: I would like to offer this exhibit at this time. Would you care to examine it, Mr. Hermann?

Mr. Hermann: I would object to it on the grounds he has not shown the relevancy of the thing. I don't doubt it is a good code or anything of that nature.

The Court: I do not know—I do not know that this witness was called upon to give any expert opinion. He was qualified as an expert but he was

(Testimony of Harold Little.)

asked no expert opinion that I could find.

Mr. Crane: Very well. I will recall him as my witness, as an expert witness later in the case.

Mr. Hermann: I have no objection to him using him as an expert.

The Court: If you have no objection he may proceed.

Mr. Crane: I still would ask him a couple of questions and put him back on as my witness.

The Court: Whatever you wish, counsel.

Q. (By Mr. Crane): You speak of BX wire in the attic. I will ask you one question and that is this: Isn't it a fact that BX wire is a fire hazard? A. Yes.

Q. And it has been outlawed by all underwriters and other electrical workers has it not?

A. No.

Q. It hasn't been outlawed? [172]

A. It has been tried for years to have it outlawed.

Q. Do you know by whom?

A. By the Trades, yes.

Q. Will BX wire set fire in an attic?

A. It has, yes.

Mr. Crane: That's all.

Redirect Examination

Q. (By Mr. Hermann): In what part of the attic was some of the BX cable burned off?

A. In the fire area.

Q. Do you know to your own knowledge whether

(Testimony of Harold Little.)

or not the plugs in the room, that is, the fixtures in the room, were alive, that is, wired up for juice?

A. Well, I never actually examined it; I never had occasion to.

Q. I see. No further questions.

Recross Examination

Q. (By Mr. Crane): Just a minute, Mr. Little. Just to clear something up here, didn't I understand, in order to get the lights on, in the upper part, that you had to cut the wire so you could put the lights in the rest of the building?

A. Yes.

Q. Didn't you have to isolate the part where the fire area was? A. Yes. I isolated that.

Q. Then there were live wires in that part where the fire area was?

A. I assumed they were.

(There were no further questions and the witness was excused from the stand.) [173]

ESTHER IPALOOK

is then called as the next witness for the plaintiff, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Mrs. Ipalook, would you please tell the judge and jury your full name?

A. Esther Barman Ipalook.

Q. Where do you live, Mrs. Ipalook?

A. Kotzebue.

(Testimony of Esther Ipalook.)

Q. How long have you lived in Kotzebue?

A. All my life, till I got married.

Q. What is your occupation in Kotzebue?

A. You mean now?

Q. What is your occupation now?

A. Nothing, now.

Q. What was your last occupation?

A. Cooking.

Q. Where did you cook?

A. At Steve Salinas' and Rotman's.

Q. Would you tell us when you cooked at Mr. Salinas'? What months?

A. September 1956 until December 1957.

Q. What duties did you have in connection with your cooking?

A. Well, I just see that we had our supplies in, sent in; sent in orders, paid for them, and see that we were supplied with groceries.

Q. Would you tell us how the supplies were during the month of December? [174] Were there any shortages?

A. We were pretty low on a few groceries like —well, these things were bought from local stores —some things like flour, sugar and coffee, butter, shortening and so forth.

Q. Who ordered those customarily from Rotman's store? A. I did.

Q. Were those ordered on credit or cash, or how were they ordered in that respect?

A. Cash orders, paid in cash.

(Testimony of Esther Ipalook.)

Q. At what time would they be paid for customarily?

A. When they were delivered there to the Kotzebue Grill.

Q. Was anything delivered, ever received from Rotman's and not paid for when received?

A. No.

Q. Were there any other shortages, other than what you have mentioned, during the month of December?

A. We were short on oil until I put an order in, and I got our oil.

Q. When did you put the order in?

A. A few days before Christmas; I don't know what day.

Q. Pardon me?

A. A few days before Christmas when I got the order in for more oil.

Q. When did you first notice the shortage of oil?

A. We ordered oil every month whenever we run low.

Q. Did you say anything to Mr. Salinas regarding a shortage of oil? A. Yes. [175]

Q. When was that?

A. It wasn't too long before; it wasn't too long before I went up and put in the order myself.

Q. About how long was it between the time you spoke to him and between the time you put in the order yourself?

A. Four or five days, I believe.

(Testimony of Esther Ipalook.)

Q. I see. Were there any other shortages, other than those items you have mentioned?

Mr. Crane: If your Honor please, at this time I am going to object to the testimony of this witness as to its materiality as to shortages in the restaurant of food. I cannot see where it has any bearing on this case at all, whether they had groceries there or whether they didn't. This man is accused of burning a building. He is not accused of being short in commodities at the restaurant. I can't see taking the Court's time up with it.

The Court: Very true. But it may be material on the question of intent or motive.

A. We were getting a little low on meat.

Q. (By Mr. Hermann): Any particular kind of meat? That you were getting low on?

A. We were short of hamburger, ground.

Q. Were there any other items besides that, that you were short of?

A. We had some meat in the back but we were out of ground round.

Q. Do you know whether or not any ground round had been ordered at the time you were short?

A. Pardon?

Q. Do you know whether or not any ground round had been ordered during this period you were short?

A. I did make out a meat order but I found out it wasn't sent.

Q. When did you make out the meat order?

A. It was sometime in December, about the mid-

(Testimony of Esther Ipalook.)

dle. It was before Christmas; I know that.

Q. How long before Christmas about?

A. About two weeks.

Q. How long does it ordinarily take an order like that to arrive, once it is sent?

A. About a week.

Q. I see. Did that order ever arrive, to your knowledge? A. No.

Q. Was there anything else ordered in addition to the hamburger at that time?

A. Yes. There was some other kinds of meat that we had orders for, but I don't recall.

Q. Was there anything besides meat that was ordered? A. No.

Q. Were there any other shortages at that time?

A. No.

Q. What was the main item of food that was sold in the Kotzebue Grill at the time you were cooking there? A. Meals. [177]

Q. What kind of meals?

A. Breakfasts, dinners.

Q. Were sandwiches sold there?

Mr. Crane: Objection, if your Honor please. It's leading and suggestive.

Mr. Hermann: All right.

Q. (By Mr. Hermann): Would you answer the question please. Was your answer yes?

Mr. Crane: If your Honor please, counsel is continually leading this witness.

The Court: I do not find it particularly leading.

(Testimony of Esther Ipalook.)

(To witness) Would you answer the question, please.

A. What was it?

(The Reporter then reads the previous question as follows: "Were sandwiches sold there?")

A. Yes.

Q. (By Mr. Hermann): What kind of sandwiches?

A. Hamburger sandwiches, any thing like that; tuna sandwiches, cold beef, cold pork.

Q. I see. Was there enough hamburger on hand to furnish the amount of hamburger sandwiches usually sold?

Mr. Crane: Objection to that as repetitious, and there is no particular time laid.

The Court: It is not necessarily repetitious. It may be [178] leading. I rather fear it is leading. Sustained on that grounds.

Q. (By Mr. Hermann): Mrs. Ipalook, are you familiar with the upstairs part of the Grill, the second floor?

A. Well I can't help know it. That's where the bathroom is; that's where the supplies was, in the room in back.

Q. About how frequently would you be up there while you were employed there?

A. Several times a day.

Q. Have you ever seen Mr. Salinas upstairs?

A. Yes.

Q. Whereabouts upstairs?

A. He would be in his room, his bedroom.

(Testimony of Esther Ipalook.)

Q. Where is his bedroom?

A. As I come down the hall I can't help but see him in the room. He would be in there either resting, writing or reading or something like that.

Q. Do you know whether or not he used the bed in that room? A. Yes.

Q. Do you know whether or not he has ever slept in that room to your own knowledge?

A. Yes.

Mr. Crane: Objected to, if your Honor please, as too indefinite if a man ever slept in a certain room. Let's confine it as to time.

Mr. Hermann: I have said during the time she was there.

Mr. Crane: She was there two years. [179]

The Court: The question is proper and relevant. But you might fix the time a little more definitely, counsel, as to when, if the witness knows, the room was so used.

Q. (By Mr. Hermann): When, if you know, was the room used for sleeping purposes? What months?

A. Not in December. I don't recall.

Q. When is the last time you recall it was so used?

Mr. Crane: Objection, if your Honor please. She said not in December.

The Court: Objection overruled. We are trying to meet the objection which you previously made, and to establish the time.

Q. (By Mr. Hermann): Would you answer the question, please.

(Testimony of Esther Ipalook.)

A. Sometimes I would see him upstairs in the afternoon, resting or reading or doing something like that, anytime during the day. I wouldn't know until I happened to make a trip upstairs.

Q. Was he using the room for resting purposes during the month of December, to your knowledge?

A. Yes.

Q. Do you know to your own knowledge whether or not anybody else, during the time you were employed there, lived upstairs?

A. Charlie Norton used to live there before he got sick.

Q. Do you recall when it was that he got sick?

A. In October; sometime in October. [180]

Q. Do you know whether or not he slept there at night? A. Yes. He slept there.

Q. When he left there, do you know whether or not he removed all of his property from there or not?

A. No, he did not. His personal belongings were still there.

Q. What kind?

A. His clothes, comb and toothbrush, and things like that on his table.

Q. Do you know whether or not anybody lived up there during the summer of last year?

A. Yes. A family that came up to cook, a lady and her children lived there.

Q. Do you know when they left, to your own knowledge?

A. I think they left in October, either September or October when they left.

(Testimony of Esther Ipalook.)

Q. Do you know when Mr. Salinas left? When he left Kotzebue after the fire?

A. He left on the 27th.

Q. Prior to the 27th had he ever said anything to you about himself leaving Kotzebue?

A. Yes.

Q. When was that?

A. It was in the month of December that he said he would be leaving sometime, but he didn't know when.

Q. Did he ever, at any time, give you any date when he would be leaving prior to the date he actually left? [181] A. No.

Q. Now when he left were you to continue working at the Grill? A. Yes.

Q. When did you terminate at the Grill?

A. Pardon?

Q. When did you quit working at the Grill?

A. After he left I was told that the wiring wasn't good, that it had to be rewired before we could ever open up for business.

Q. Then you never worked at the Grill after that? A. No.

Q. Do you recall whether or not ice cream was served at the Kotzebue Grill? A. Yes.

Q. Do you know what type of package the ice cream was served in?

A. Yes. They were in these two and a half gallon packages.

Q. Would you describe the packages?

A. Round, and about so high (indicating).

(Testimony of Esther Ipalook.)

Q. Do you know what would become of these containers when they were empty?

A. We saved some last year for some people, for some people in town that wanted them.

Q. Do you recall whether or not you saved any this year, in 1957? A. I saved three.

Q. When was that, that you saved those three, about when? A. Sometime in December.

Q. Have you been back to the Grill since the fire?

A. Well, I went over there to clean up a few days after the fire.

Q. Did you see any of those ice cream containers at that time? A. No.

Q. When was the last time you saw the three ice cream containers?

A. Sometime before Christmas.

Q. What would you do with these containers you saved? Where would you put them?

A. I set them in the back room, in the back where we had a cooler.

Q. I see. No further questions.

Cross Examination

Q. (By Mr. Crane): Esther, that restaurant up there known as the Kotzebue Grill, owned by Steve Salinas, where you worked, that's just the ordinary type of general restaurant, is it not? A. Yes.

Q. The purpose of it is to serve meals to the public? A. Yes.

Q. Some days you are probably short of some

(Testimony of Esther Ipalook.)

things; and some days long on other things? Is that right? A. Right.

Q. If you are short of any commodities you can always get them from Rotman's Store, is that correct? A. Yes.

Q. Now counsel just asked you about these ice cream containers. You say the last time you saw them was sometime before Christmas. Do you remember about [183] how long before Christmas it was the last time you saw them, approximately? You don't need to tie it down too definitely.

A. Not too long before Christmas.

Q. Where did you see them—back in the storeroom? A. Yes.

Q. Did you notice any time before the fire that they were gone? A. No.

Q. You don't know whether they were still there? A. I don't remember.

Q. You don't remember whether somebody had taken them out or not?

A. No, I don't know when they—I didn't notice they were gone or not after I set them back there.

Q. About what time did you set them back there? A. As they were empty, one at a time.

Q. Esther, if they had still been there the last time you were in that room you would have seen them, would you not?

A. If I took time to look around I would have. But I had put them on a shelf and when I go in the back to get something I don't usually look all around the room. I just pick up what I went to get and come back.

(Testimony of Esther Ipalook.)

Q. The oil tank, that oil storage tank that you have at the restaurant is about a 1500 gallon tank isn't it?

A. Must have been. It's a large tank.

Q. When the oil gets down to a certain level, do you have somebody measure it then call up for oil?

A. Yes. [184]

Q. Isn't it a fact that at the time you called Steve to refill or called for oil, there was approximately 200 gallons in the tank? A. Yes.

Q. Now let's get to this room upstairs. You say that Steve would go up there sometimes in the afternoon and rest? A. Yes.

Q. Charlie Norton, according to your testimony, took sick along in the last of October. Is that about correct? A. Yes.

Q. He was taken from the place to the Kotzebue Hospital, was he not? A. Yes.

Q. Do you know of your own knowledge that he was evacuated from the Kotzebue Hospital and to Edgecumbe? A. Yes.

Q. You do know of your own knowledge that Charlie Norton hasn't been back in the building since last October? A. No.

Q. No. Has he been in Kotzebue since the last of November when they took him to the hospital?

A. No.

Q. Do you know in what condition he was when they took him to the hospital?

Mr. Hermann: We object to that, your Honor. It calls for a medical opinion.

(Testimony of Esther Ipalook.)

The Court: Well, hardly. [185]

Mr. Crane: I don't mean diagnosis.

Q. (By Mr. Crane): Had he had an accident, was he sick, mentally ill, or what was the occasion to take him to the hospital?

Mr. Hermann: Now, I think definitely——

A. He didn't look well; he looked like he was sick.

Q. (By Mr. Crane): Now about Charlie Norton's effects. You say some of his personal belongings are still in the building. As a matter of fact, Esther, there is no place else for him to leave them, is there, except up there? A. No.

Q. He hasn't any relatives or close friends that could come and get them, has he? A. No.

Q. I will ask you if it isn't a fact, and if you don't know of your own knowledge that that building has not been occupied for a dwelling house since Charlie Norton left in October?

Mr. Hermann: I object to the question, if your Honor please, which calls for a conclusion rather than anything she has seen or observed or has personal knowledge of.

The Court: The question raises a point of law which I should like to discuss with counsel, and I will ask the jury to please retire to the jury room for a few moments. You could step down, Mrs. Ipalook.

(The jury retires from the courtroom and the witness leaves the stand.) [186]

The Court: The jury being excused, I wonder if

counsel are aware of the amendment to this statute upon which the indictment is based and, if so, whether it is material at all as to whether or not this building was actually occupied as a residence or for dwelling purposes at the time of the fire. The 1957 amendment clearly provides that the crime of arson in the first degree, arson in a dwelling house, may be committed whether or not the premises are occupied, unoccupied or vacant. Now there was a previous statute which defined what was a dwelling house, and that was repealed by the same Act of the Legislature. So why is it material as to whether or not the place was actually occupied for a dwelling at the time of the fire? Mr. Taylor, you were in the Legislature at the time this amendment was made. Perhaps you could throw some light on it.

Mr. Taylor: Your Honor, under the present law, the first degree burning of a dwelling house, all we have to show is that it was not used for a dwelling. It must be used for a dwelling at the time of the fire.

The Court: That's not what the statute says as now amended. It says precisely the opposite. The amendment says whether occupied, unoccupied or vacant.

Mr. Taylor: But not a dwelling house. The restaurant has not been used as a dwelling house. The single room that one man slept in is not a dwelling house.

The Court: I have looked into this question and find the test is whether it is customarily used by any person for a dwelling [187] or a place to live.

It is not necessary that it be shown that it is so occupied at the time of the fire. That was probably true before this amendment was made.

Mr. Taylor: I think this too, because it is not primarily a dwelling. It is primarily a business building, if there was nobody in there that used it for a dwelling and it has not for some time been used as a dwelling.

The Court: You will find that there is ample law to the effect that the fact a building is used for other or business purposes in addition to a place for someone to live does not take away from the fact that it is a dwelling.

Mr. Taylor: But it must be the burning of a dwelling house.

The Court: Yes, certainly.

Mr. Taylor: At the time of the burning it was not a dwelling house.

The Court: At the time of the burning it was a dwelling house if it had been ordinarily or customarily used for that purpose. It is not necessary that it had been used for such that day. If it was abandoned as such that is a different story. There is ample authority on it, and I have looked into it rather carefully.

Mr. Taylor: We strongly contend, your Honor, that it is not basically a dwelling house; it is a business house and was used occasionally as a place for Mr. Salinas, and also his cleanup man who had become sick had a room there for awhile. Now the testimony is that it is mostly storage, and I don't think—— [188]

The Court: There is probably an issue there for the jury to determine, whether or not the building had been customarily, ordinarily used for dwelling purposes, but strictly speaking, whether it was so occupied at the time is wholly immaterial and I will have to so instruct the jury.

Mr. Taylor: I think, your Honor, we have also to say, if you hold that way you also have to hold that if it was not occupied it was not a dwelling, because the only thing carried on there was a business.

The Court: Well, that's not the law, counsel, not under this amendment. It would have been under the previous definition of arson. It could be under the common law; but just why the Legislature amended it I do not know.

Mr. Taylor: Under this Act when this building was vacated, your Honor, it reverted to a business building, not to a dwelling. It never was a dwelling, incidentally, because one person lived there, up in that room.

The Court: That makes it a dwelling, if one person alone lives in a dwelling. That's the law. If it is abandoned, it ceases.

Mr. Taylor: And it had been for over a month. Nobody slept up there.

The Court: The previous statute, which the Legislature expressly repealed, said "that any building is deemed a 'dwelling house' with the meaning of the sections of this act defining the crime of arson any part of which has usually been occupied by [189] any person lodging therein." Now the Act is

simply an expression of the common law. Now if they repeal it, as the Legislature did, then we are governed simply by the common law which is precisely the same thing—if it is "usually occupied." But in addition to that the Legislature saw fit to provide that it need not be occupied at the time.

Mr. Crane: If your Honor please, I believe I can find some cases on this theory where it is primarily a business house with part of it being occupied as a dwelling, takes it out of the class of a dwelling house.

The Court: If you can find a single case to that effect I will be happy to see it, but I find the law is wholly the opposite.

Mr. Crane: I am not certain that I have it here.

The Court: If you can cite a single case, it will be contrary to authority as I find it. It is true that if the premises are abandoned for any living or dwelling purposes then it is no longer a dwelling. I think it has been clearly shown by the Government's witnesses that Charlie Norton—Well, there is a question to be put to the jury as to whether it was abandoned, and that is the only relevancy I can see of this type of testimony. We will call in the jury.

Mr. Crane: May we have a few minutes. We might ask—I was thinking I might look into——

The Court: Well, we will have a two hour recess soon. You should be prepared on important points such as this. You may call in the jury. [190]

(The jury returned to the box and the witness resumed the stand.)

ESTHER IPALOOK

resumed the stand.

Q. (By Mr. Crane): I will ask you just one more question, if you know. Has the upstairs of the Kotzebue Grill been abandoned as living and dwelling quarters?

Mr. Hermann: Objection, if your Honor please——

The Court: That calls for a conclusion of law. Objection sustained. You may show the facts. You said abandoned?

Mr. Crane: Yes.

The Court: You used the word "abandoned" and that is a question of law, not of fact.

Q. (By Mr. Crane): I will ask you then, if the upstairs of the Kotzebue Grill has been unoccupied, except for storage, since Charlie Norton left?

A. Yes.

Q. Now, Mrs. Ipalook, during November and December of 1957, as far as you know, did anybody eat upstairs? A. No.

Q. Did anybody use any part of the upstairs for housekeeping?

A. The washing, laundry is done upstairs.

Q. That was washing laundry for the restaurant, was it not? A. Yes.

Q. No individuals lived up there and used it?

A. No.

Q. That's all. [191]

Redirect Examination

Q. (By Mr. Hermann): Mrs. Ipalook, in re-

(Testimony of Esther Ipalook.)
gard to the groceries purchased from Rotman's, do you know to your own knowledge whether or not you were paying for them at wholesale rates or retail rates or any other type of rates?

A. Retail.

Mr. Taylor: We object, your Honor, to the method of payment for the groceries. It's incompetent, irrelevant and immaterial in this matter. She said they paid cash for them.

The Court: Oh, I rather think so. I cannot see the relevancy of it.

Mr. Hermann: It would relate to what was customarily done.

The Court: That would not be proper redirect because that subject wasn't one asked on direct. Objection sustained.

Q. (By Mr. Hermann): Mrs. Ipalook, do you know of your own knowledge whether or not Charlie Norton owned any other home in Kotzebue? Whether he had any other home in Kotzebue other than the Grill building?

A. He has a mother-in-law up there.

Q. Did he ever stay with his mother-in-law during the time he was employed at the Grill to your knowledge? A. No.

Q. Do you know whether or not any of Mr. Salinas' things were in his room during the month of December?

A. I noticed his personal belongings were still in the room.

Q. What kind? [192]

(Testimony of Esther Ipalook.)

A. Clothes. I would see clothes hanging in the closet, and his shoes.

Q. Do you know to your own knowledge where Mr. Salinas' laundry was done?

A. Upstairs in the Grill.

Q. I mean his personal laundry. Was that done upstairs? A. Yes.

Q. No further questions.

Recross Examination

Q. (By Mr. Crane): You spoke of Charlie Norton. Isn't it a matter of fact, Esther, that Charlie Norton quite frequently, a good part of the time, stayed over at Stubby Lambert's.

A. He used to go up there. I heard he used to go up there and visit some evenings.

Q. Now you spoke of—they have asked you about Steve Salinas' clothes being in his room. Isn't it a fact that he kept his cooking clothes and clothing and stuff that he used in the restaurant upstairs in that room. If he would come down from Rotman's and go up there and change clothes he would change into the clothes he would use around the restaurant. Isn't that the situation?

A. Well, I have never seen him changing clothes.

Q. Well, naturally. But what I am getting at, Salinas lived over at Rotman's and what he kept upstairs in his closet particularly, was clothes he used around the restaurant, wasn't it?

A. I guess so.

The Court: I think on the ruling on the objec-

(Testimony of Esther Ipalook.)

tion to the [193] question as to whether this witness thought the property was abandoned I think I said it was a matter of law. I mean to correct that. I think that is calling for a conclusion of the witness but I think in the final analysis it is going to be a question of fact. That is the way it looks to me.

Mr. Crane: Then may I be permitted to inquire of the witness——

The Court: No. It calls for a conclusion of the witness. My correction is, that it calls for a conclusion of the witness but it is not strictly a matter of law.

Mr. Crane: What I was getting at, my theory was there, I asked her if she knew of her own knowledge that the place had been abandoned as of a certain date.

The Court: But my ruling is that you may show facts but not her conclusions. That surely is a conclusion of the witness.

We will take a recess now until two o'clock.

(Thereupon the court duly admonished the jury and the regular noon recess was taken.)

After Recess

(At 2:00 p.m. court resumed session and the trial of the cause was resumed. Both counsel stipulated as to the presence of the jury and all others necessary were again present. The witness Esther Ipalook resumed the stand for further recross examination.) [194]

Q. (By Mr. Crane): Mrs. Ipalook, I have one more question I wish to ask you. I will ask you if

(Testimony of Esther Ipalook.)

it wasn't generally known by the help in the restaurant and by yourself that Steve Salinas was planning to go on a vacation in the latter part of December, 1957? A. Yes.

(There were no further questions and the witness was excused from the stand.)

ARCHIE ADIRIM

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Crane): Mr. Adirim, would you please tell the Court and jury your full name and occupation?

A. Archie Adirim, Deputy United States Marshal, stationed at Kotzebue, Alaska.

Q. How long have you had that capacity at Kotzebue? A. Approximately fifteen months.

Q. Were you stationed there in December of 1957? A. Yes.

Q. Do you recall where you were on the night of December 25, 1957? A. Yes, sir.

Q. Where were you that evening?

A. The first part of the evening I was at home, until late in the evening.

Q. What time did you leave home? [195]

A. It was approximately 11:50 or 11:55.

Q. Was there any particular reason you left at that time?

A. Yes. Thomas Richards came to the house and

(Testimony of Archie Adirim.)
told me there was a fire at the Kotzebue Grill and that someone had told him they had found some Blazo at the scene.

Mr. Crane: I object to what somebody else told him that was found at the scene of the crime as hearsay.

The Court: He may explain his conduct or reason for going to the fire, but the remark is probably hearsay. As to what somebody told you they found at the scene, that may be stricken, and the jury instructed to disregard it.

Q. (By Mr. Hermann): Had you had any previous indication there was a fire?

A. Well, I heard the church bell go at approximately 11:30 but I didn't know at that time there was a fire. I thought it was for midnight Mass at the Catholic Church, the best I can recall.

Q. What did you do when you left your house to go to the fire? What did you do then?

A. I walked to the fire and went into the Grill, into the kitchen of the Grill, and saw Charlie Wilson and asked him where the fire was supposed to be, and he said it was upstairs, and I went upstairs and I could see no indication of fire whatever at that time. It was out. However, someone was still up in the attic throwing water.

Q. What did you do then.

A. Well at that time there was somebody going through the hallway [196] ceiling entrance and I gave them my big light and helped push him up through the entrance.

(Testimony of Archie Adirim.)

Q. Do you know who it was?

A. I am not sure who it was; I believe it was Robert Lee, but I am not sure.

Q. Was Mr. Salinas at the fire at all?

A. I didn't see him then, but after that.

Q. About what time did you see him?

A. Approximately ten or fifteen minutes after I was there, after I got there.

Q. Was there any conversation that took place between you and Mr. Salinas?

A. He told me someone didn't like him.

Q. Did he say anything further?

A. No. Not at that time.

Q. How long did you remain in the building on that occasion?

A. Oh, approximately 20 to 25 minutes.

Q. Did you see Mr. Salinas at any time after that, when you saw him in the building there?

A. I believe I saw him downstairs.

Q. Was there any conversation that took place at that time? A. No. Not at that time.

Q. When did you next see him?

A. I believe it was the next morning he came to the house, came to the marshal's office. [197]

Q. Your house? A. Yes sir.

Q. What took place while he was at your house?

A. Well he told me from the information how the fire situation looked, that probably a small man had started the fire.

Q. Did he say anything further?

A. No sir. Not on the subject of the fire.

(Testimony of Archie Adirim.)

Q. How long did he remain at your house at that time?

A. I would say approximately ten minutes.

Q. When did you next see him?

A. That evening.

Q. Where at? A. At the Kotzebue Grill.

Q. What took place on that occasion?

A. I went to the Grill—a boy came to my place, Bernard Sheldon, and told me Mr. Salinas would like to see me at the Grill. So I went to the Grill and Mr. Salinas was there in the kitchen part of the Grill, and he told me he wanted to see me upstairs. So I went upstairs with Mr. Salinas and he asked me what I was going to do about the fire, and I told him I was going around getting statements and then he asked me if I had called the fire marshal and I told him I had called the fire marshal, and then he said that I went over his head by calling the fire marshal.

Q. Did he say anything further?

A. He said it was his building and I shouldn't have gone over his head to call the fire marshal, and besides he wanted to wire the building before [198] the fire marshal got there.

Q. Was anything else said at that time?

A. We had a discussion—I believe something else was said but I don't recall what it was.

Q. When did you see him again, if you did?

A. I left about that time, and he came out to the house, followed me up to the house, to the office.

(Testimony of Archie Adirim.)

Q. He followed you at the same time?

A. Yes.

Q. What took place at the house?

A. He told me that I never cooperated with him, and I told him my boss was Mr. Oliver at Nome, R. W. Oliver, the Marshal at Nome, and if he had any objections to my work or anything to say about it, to tell the Marshal, Mr. Oliver. He told me he didn't want to do that and I told him I wanted him to because I wanted to get it squared away.

Q. When did you next see him, if you did?

A. I don't think I saw him after that.

Q. Now aside from the time of the fire, were you ever in the building after the fire?

A. Yes sir.

Q. When was that?

A. I believe it was the evening of the 27th, the early afternoon of the 27th of December.

Q. Were you alone or were there others? [199]

A. No. There was a Mr. Mullaly was with me from the Kotzebue Electric Association, and also two others, two OSI. They had nothing to do with the investigation; they had heard about the fire and wanted to see the damage to the building.

Q. Was anyone else present?

A. Joseph Brantley.

Q. How did you get in the building?

A. Mr. Brantley let us in.

Q. Did he raise any objection whatever to letting you in the building? A. No, he didn't.

(Testimony of Archie Adirim.)

Q. What did you do after you went in the building with Mr. Brantley?

A. We went to the back room and I went to the attic.

Q. What did you do in the attic?

A. I was looking for evidence.

Q. Did you remove anything from the attic?

A. Yes, I did.

Q. What did you remove?

A. I removed the casing of a soldering iron and two round hoops and an oval shaped hoop and an oval shaped disc.

Q. Would you tell us exactly where you removed those items from?

Mr. Crane: If your Honor please, at this time I am going to make a demand on the Government that they produce these items. This is the second or third witness that has testified about them.

The Court: They may produce them in due course. Naturally he must lay a foundation as to where the articles came from and [200] when before they can be offered in evidence.

Mr. Taylor: I believe they should be marked for identification first.

The Court: No. You may proceed.

Q. (By Mr. Hermann): Where did you take them? Where did you take these items from, exactly where?

A. I took them from the attic, just to the west of the attic entrance, on the west side between the joists.

(Testimony of Archie Adirim.)

Q. To which attic entrance do you refer?

A. The attic entrance in the back room.

Mr. Hermann: I would like to have these labeled for identification.

(Two hoops are marked for identification as plaintiff's Exhibit B.)

Q. Mr. Adirim, I hand you plaintiff's Exhibit B for identification and ask you if you recognize this object? A. Yes sir.

Q. What is that object?

A. Two round hoops that I found up there.

Q. Would you speak a little louder, please.

A. Two round hoops that I found at the scene of the fire in the Kotzebue Grill.

Q. Is there any way you can tell that those are the same hoops?

A. Yes. I have them marked there. [201]

Q. That tag, is that in your handwriting?

A. Yes, it is.

Mr. Hermann: At this time I would like to offer Exhibit B in evidence.

Mr. Crane: No objection.

The Court: It may be received.

(Plaintiff's Exhibit B is received in evidence.)

Mr. Hermann: I would like to have these labeled for identification.

(A hoop is marked for identification as plaintiff's Exhibit C; an oval metal disc is labeled for identification as plaintiff's Exhibit D.)

Q. Mr. Adirim, I hand you plaintiff's Exhibit C

(Testimony of Archie Adirim.)

for identification and ask you if you recognize it.

A. Yes sir.

Q. What is that?

A. That's the oval hoop that I removed from the scene of the fire at the Kotzebue Grill.

Q. And I hand you plaintiff's Exhibit D for identification and ask you if you recognize that?

A. Yes sir.

Q. What is it?

A. It's an oval shaped object I took from the fire scene. [202]

Mr. Hermann: At this time I would like to introduce both Exhibits C and D in evidence.

Mr. Crane: No objection.

The Court: They may be received.

(Plaintiff's Exhibits C and D are received in evidence.)

Mr. Taylor: If your Honor please, we are admitting them in evidence with the assumption they will eventually be connected with the res gestae of the crime.

The Court: Very well. You mean the Court is admitting them in evidence—you mean you do not object to them being admitted.

Mr. Taylor: Yes.

Mr. Hermann: I would like to have this item marked for identification.

(The casing of a soldering iron is marked for identification as plaintiff's Exhibit E.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit E for identification and ask

(Testimony of Archie Adirim.)

you if you recognize that item. A. Yes sir.

Q. What is it?

A. It is a soldering iron casing that I found at the scene of the fire at the Kotzebue Grill.

Q. Whereabouts at the scene of the fire was it found? [203]

A. Between the joists, just on the west side of the entrance.

Q. I see.

Mr. Hermann: I would like to offer this as plaintiff's Exhibit E.

Mr. Taylor: We would like to take a look at it first.

Mr. Hermann: Certainly.

Mr. Taylor: No objection.

The Court: The exhibit may be received.

(Plaintiff's Exhibit E is received in evidence.)

Mr. Hermann: I would like to have this item marked for identification purposes.

(A drawing of a floor plan is marked for identification as plaintiff's Exhibit F.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit F for identification and ask you if you recognize it. A. Yes sir.

Q. What is it?

A. It is a drawing that I made of the upstairs floor, if the attic had been removed, of the Kotzebue Grill.

Q. Can you state whether or not that is made to scale?

(Testimony of Archie Adirim.)

A. Well, it's made to scale, but not right down to the last inch because I didn't have the right equipment. [204]

Q. When did you make that?

A. That was made on the ninth of January, 1957.

Q. Did you make any actual measurements on the premises when you made that?

A. Yes. There was some actual measurements.

Q. Where did you measure from?

A. From these light fixtures in the back room.

Q. Where were the room arrangements measured from? A. From the outside.

Q. From the hallway?

A. The rear room was measured on the inside.

Q. Would you explain what the circles are?

A. They represent the light fixtures in the rear room.

Q. What does the more or less square represent?

A. That represents the attic entrance, into the attic.

Mr. Hermann: We would like to offer this in evidence as plaintiff's Exhibit E.

Mr. Taylor: We object, your Honor, on the grounds there is some writing upon them that is not borne out by the evidence, and also an attempt to get some evidence in that is contrary to the statements of the Government's other witnesses. If I may approach the bench.

(The following proceedings were at the bench

(Testimony of Archie Adirim.)

out of hearing of the jury:)

Mr. Taylor: We object to the labeling of the two rooms as bedrooms, but we have no objection to changing it to show just rooms. [205]

The Court: There was evidence of two witnesses they were bedrooms. There has been evidence of bedrooms. We must go by the evidence, not what you would like to have in evidence. There is ample evidence they were bedrooms.

(The following proceedings were within hearing of the jury:)

The Court: Objection overruled. The Exhibit may be received.

(Plaintiff's exhibit F is received in evidence.)

Q. (By Mr. Hermann): Mr. Adirim, I would like you to put an X in the area where you removed the items last identified, including the soldering iron casing and the hoops.

(The witness marks the Exhibit.)

Q. Would you put a larger X there that can be easily seen.

(The witness marks the Exhibit.)

Mr. Hermann: I would like to present the drawing to the jury.

The Court: Very well. It is understood, of course, that drawings of this nature are purely for illustrative purposes. They have no evidentiary value, but they are just to illustrate the witness' testimony.

Mr. Taylor: That's right, your Honor.

(The jury views the Exhibit.)

(Testimony of Archie Adirim.)

Mr. Hermann: I would like to have these photographs, there are seven of them, marked for identification.

The Court: They may be marked as a group and then you can [206] number each one in the group.

Mr. Crane: Those are the Pilcher photographs, are they?

Mr. Hermann: Yes.

(The photographs are handed to Mr. Crane.)

Mr. Crane: I think I agreed with Mr. Hermann that these should be introduced in evidence.

The Court: These are the ones you mentioned yesterday?

Mr. Crane: Yes. I presume they are. Are they not, Mr. Hermann?

Mr. Hermann: Yes.

The Court: It may be stipulated then, that the photographs which the District Attorney has just asked to be marked for identification, may be received.

(A series of photographs are marked for identification as plaintiff's Exhibit G-1, G-2, G-3, G-4, G-5, G-6, G-7.)

Mr. Crane: Yes, your Honor, that's quite right.

Mr. Hermann: Yes, your Honor. These are actually duplicates of them.

Mr. Crane: There are two photographs here, your Honor, that I would have to request that they be shown who put them there and how these items got there. They are not the ones I saw. These items were taken from the negatives of someone else.

(Testimony of Archie Adirim.)

Mr. Hermann: I object to counsel's remark. If he wants to object—— [207]

The Court: In other words, you withdraw the stipulation?

Mr. Crane: As to these two only.

The Court: Very well. They may be properly identified. What are those two numbers?

Mr. Hermann: Those two are five and six.

Mr. Taylor: Five and six, the reason we are objecting is that they are arranged exhibits.

Mr. Hermann: I object to counsel's remark.

Mr. Crane: We are not stipulating to it. We wanted——

Mr. Hermann: His remark is completely uncalled for.

Mr. Taylor: I think it's uncalled for to try and slip them in here.

The Court: Let us not harangue here. After all this is an orderly court. The stipulation is withdrawn as to these two exhibits, and they may be properly identified.

Mr. Hermann: I would like to move to strike counsel's remarks.

The Court: The remarks may be stricken.

(Plaintiff's Identifications G-1, G-2, G-3, G-4, and G-7, are received in evidence.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit G and ask you to examine them please.

Q. Do you recognize the photographs?

A. Yes, I do. [208]

(Testimony of Archie Adirim.)

Q. What are they pictures of?

A. These are pictures taken from the fire scene at the Kotzebue Grill.

Q. In your opinion do those photographs represent the scene as you saw it? A. Yes sir.

Q. On what date?

A. On the 30th when the pictures were taken, and also the first time I went there.

Q. The 30th of what? A. December, 1957.

The Court: Who took them?

A. Harold Pilcher.

The Court: In your presence?

A. Yes sir. I was there when he took the pictures.

The Court: Are you offering these two at this time? The only ones that are received in evidence then are this group, with the exception of these two, 5 and 6.

Q. (By Mr. Hermann): Mr. Adirim, were you ever in that building again after the 27th?

A. Yes sir.

Q. When was that?

A. That was on the 30th of December, 1957.

Q. Who was present on that occasion?

A. Mr. Oliver, Marshal Oliver, and Edward Harkabus. Mr. Harkabus is a special investigator for the—— [209]

Mr. Crane: We object to the remark as to who Mr. Harkabus is. Let him call the witness.

The Court: Objection overruled. He may state who he is, if he knows.

(Testimony of Archie Adirim.)

Q. (By Mr. Hermann): Continue.

A. Mr. Harkabus is a special investigator of the National Board of Underwriters and Insurance.

Q. How did you gain entrance to the building at that time?

A. Mr. Brantley admitted us.

Q. Did you remove anything from the building at that time? A. Yes, sir.

Q. What did you remove?

A. We removed a soldering iron element and a piece of paper and a cord and a piece of wire that had two other small pieces hanging onto the ends, other small pieces of wire, copper wire.

Q. Was anything else removed at that time?

A. Yes. We removed some sawdust from the attic.

Mr. Hermann: I would like to have this labeled for identification.

(An electric cord is marked for identification as plaintiff's Exhibit H.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit H for identification and ask you to examine it and tell us whether it is familiar to you? A. Yes sir. [210]

Q. What is it?

A. I believe it to be the cord of a soldering iron.

Mr. Crane: If your Honor please, I ask that the answer be stricken, what he believes it to be. He can answer whether it is a cord or not. It calls for an opinion as to what he believes it to be a cord of.

(Testimony of Archie Adirim.)

The Court: Why can't he state what he believes it to be, unless it is a matter of expert knowledge. Objection overruled.

Q. (By Mr. Hermann): Where does that come from, Mr. Adirim?

A. It came from the Kotzebue Grill.

Q. Whereabouts?

A. It was in the back room of the Grill and frozen to the bottom of a box.

Q. By back room, what floor of the Grill?

A. That was on the second floor.

Q. I see.

Mr. Hermann: I would like to move the Exhibit be accepted in evidence as plaintiff's Exhibit H.

Mr. Crane: We object, your Honor, upon the grounds that it wasn't shown it was ever in the attic or had anything to do with the fire. They haven't shown what type of cord it is and it is incompetent, irrelevant and immaterial at the present time. It might be a cord to an electric toaster.

The Court: It might be. It is competent evidence and may be received. [210]

(Plaintiff's Exhibit H is received in evidence.)

Mr. Hermann: I would like to have this item labeled for identification purposes.

(A soldering iron element is marked for identification as plaintiff's Exhibit I.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit I for identification and ask you if you recognize it? A. Yes, I do.

(Testimony of Archie Adirim.)

Q. And what is it?

A. It is an element to a soldering iron, the heating element.

Q. How do you know it is an element?

A. Well I have seen other soldering irons that have similar elements.

Q. Where did that come from?

A. It was laying on a bed against the south wall in the upstairs back room.

Q. Where was that bed in relation to the attic entrance of the back upstairs room?

A. The attic entrance would be to the north. May I see that sketch?

The Court: Yes.

Q. (By Mr. Hermann): I hand you plaintiff's Exhibit F and ask you if you can explain where the element was? [211]

A. Yes. There was a bed right in about here (indicating).

Q. Would you write the word element where you found that and put your initials after it.

(The witness marks the Exhibit.)

Q. (By Mr. Hermann): Would you attach that tag to the object, you have returned to me.

(The witness does as requested.)

Q. (By Mr. Hermann): What is that tag, Mr. Adirim?

A. My identification tag that I made out.

Q. When did you attach it?

A. December 30, 1957.

Mr. Hermann: I would like to move that this be accepted as plaintiff's Exhibit I.

(Testimony of Archie Adirim.)

Mr. Taylor: I would like to take a look at it, please.

Mr. Hermann: Certainly.

Mr. Taylor: If your Honor please, we are going to object to the admission of this upon the grounds it is not connected up with the alleged offense and not connected up with any other part of a soldering iron. It was found several days later laying on a bed in second floor. It doesn't show connection in any way whatever.

The Court: This Court does not pass upon the sufficiency of the evidence. That is for the jury. What you are arguing about is how good it is. It is proper evidence and may be received. It is for the jury to decide how valuable it is, not me. I would wish [212] he would explain though, if he can, in his knowledge, what is the relationship between Exhibit E and Exhibit I.

(Plaintiff's Exhibit I is received in evidence.)

The Court: Would you get the other Exhibit, E, please. If there is any connection between the two I think it should be explained.

Q. (By Mr. Hermann): Mr. Adirim, would you explain, if you are able to do so, any connection between Exhibit E and Exhibit I.

A. Yes. The element fits into the iron.

Q. I see. Where was Exhibit I found?

A. It was found on the bed against the south wall. In the upstairs back room.

Q. Where was Exhibit E found?

A. This was found in the attic.

(Testimony of Archie Adirim.)

Q. How far was Exhibit E found from where Exhibit I was found, in feet, if you know?

A. I don't know exactly, but I would say about seven or eight feet.

Mr. Hermann: Has Exhibit I been received in evidence?

The Court: Yes.

Mr. Hermann: I would like to have this jar marked for identification.

(A jar containing a piece of paper is marked for identification as plaintiff's Exhibit J.) [213]

Mr. Taylor: If your Honor please, we are going to object to the introduction of those as evidence unless properly connected up as to having some connection with the crime or connection with this defendant—a paper towel in a jar——

Mr. Hermann: We haven't moved to have them admitted in evidence as yet.

Mr. Taylor: I will move against them anyway. We don't know whether they are in the same condition as when found there, whether they were found in the jar or not. There is no identification as to their original state when found.

The Court: I rather think your objection is premature, counsel. We will wait to see if it can be identified.

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit J for identification and ask you if you recognize it? A. Yes, I do.

Q. What is it?

A. It is a piece of paper that was found in the

(Testimony of Archie Adirim.)
attic at the scene of the fire in the Kotzebue Grill.

Q. Would you state whether or not it was found in the jar at the time?

A. No sir. It was not found in the jar.

Q. When was it placed in the jar?

A. It was placed there on the 30th, December 30, 1957.

Q. Who placed it in the jar?

A. I did. [214]

Q. Now exactly where was that found in the attic? The paper?

A. It was found to the north of where I found the hoops and soldering iron case.

Q. How far to the north?

A. Approximately two and a half feet.

Q. Would you state whether or not you had seen any other paper of that nature at the Kotzebue Grill. A. I did.

Q. Where at? A. In the bathroom.

Q. What kind? A. Rolls.

Q. What kind of rolls?

A. Toweling, I believe it was.

Q. Do you recognize the tag on that jar?

A. Yes, I do.

Q. Where has that exhibit been since you found it?

A. It has been in the office of the marshal here in Nome, in the evidence locker.

Q. I see. Would you remove it from the jar, please, the paper.

The Court: Counsel, perhaps you had best offer it before proceeding further.

(Testimony of Archie Adirim.)

Mr. Hermann: I would like to offer Plaintiff's Exhibit J for identification into evidence.

Mr. Taylor: I would object, your Honor, upon the grounds set forth. This was secured several days afterwards. A lot of men were [215] working around there, cleaning up, and it could just as well have been put up there after the fire as before. In fact I think common sense would tell us it was.

The Court: Counsel, your argument is for the jury. I do not pass on the weight of the evidence. You are arguing to the jury that it is not very good evidence and that is not proper. What is the legal objection to its introduction?

Mr. Taylor: It is incompetent, irrelevant and immaterial and not connected up with the crime, your Honor.

The Court: Objection overruled. It may be received.

(Plaintiff's Exhibit J is received in evidence.)

Q. (By Mr. Hermann): Would you remove the paper towel from the jar, please.

(The witness does so.)

Q. Would you examine it. Now, would you tell us how you can tell that is the same towel that you recovered from the attic?

A. It has here a stain (indicating), some kind of a stain. It looks like a pinkish stain. And it also has these marks here, soot and cinders there (indicating) on the towel.

Q. Would you state whether or not you have

(Testimony of Archie Adirim.)
ever seen anything similar to that tannish stain at the Kotzebue Grill?

A. Yes. I believe I have.

Q. Where?

A. In the room of Mr. Salinas. [216]

Q. What was it?

A. Some tan pancake makeup.

Q. Would you replace it in the jar, please.

(The witness does so.)

Mr. Hermann: I would like to have this quart jar labeled for identification purposes.

(A jar containing sawdust is marked for identification as plaintiff's Exhibit K.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's K for identification and ask you if you can identify it. A. Yes, sir.

Q. What does that jar contain?

A. It contains sawdust taken from the fire area that contains a similar smell of gasoline.

Mr. Crane: I ask that the last part of the answer be stricken. There is no evidence of any gasoline in here yet of this witness.

The Court: What did you mean, Mr. Adirim, by a similar smell?

A. Well, either gasoline or blazo.

The Court: What you meant is a smell similar to gasoline?

A. Yes.

The Court: Objection overruled.

Q. (By Mr. Hermann): Where did that sawdust come from? [217]

(Testimony of Archie Adirim.)

A. It came from an area of three to five inches just right where I found the soldering iron casing. The general area where the hoops were found.

Q. How far in relation to the door of the attic, the trap door?

A. Right to the west, and just in between the two joists, right next to the plugin there, the light socket.

Q. Who was present when that sawdust was removed?

A. Myself, Marshal Oliver, Mr. Harkabus, and Abraham Kowunna.

Q. What kind of condition was that sawdust in? Describe it at the time you found it.

A. The sawdust up there—digging around in the sawdust—the sawdust was frozen. We dug through and we got this odor, and we put the sawdust in a can that was cleaned out—the can was cleaned out—and we took it to the office. My wife got this jar and washed and dried the jar thoroughly, and we put the sawdust in here.

Q. Where has that jar been since then?

A. It has been in the evidence locker here of the United States Marshal at Nome.

Q. Do you know of your own knowledge whether or not that jar has ever been opened since that time?

A. It was opened once I believe.

Q. When was that?

A. That was approximately a month ago, I believe, when I was down here.

(Testimony of Archie Adirim.)

Q. Was anything removed or added to it at that time? A. No sir. [218]

Mr. Hermann: I would like to offer plaintiff's Exhibit K for identification.

Mr. Taylor: Let's take a look at it.

The Court: Any objection?

Mr. Taylor: No objection.

The Court: It may be received.

Mr. Hermann: I would like permission to open the jar and pass it to the jury after it has been labeled.

(Plaintiff's Exhibit K is received in evidence.)

(The Exhibit is passed to the jury.)

Mr. Hermann: I would ask the jury to smell it.

(The Exhibit is then handed to the witness.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit K and ask you to smell it and tell me whether or not it smells the same as it did at the time it was taken?

A. It smells the same, or it was stronger at that time.

Q. As to the quality, is it the same type of smell? A. Yes sir.

Mr. Hermann: I would like to have this labeled for identification purposes.

(A piece of cable is marked for identification as plaintiff's Exhibit L.) [219]

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit L for identification and ask you if you can identify it? A. Yes sir.

(Testimony of Archie Adirim.)

Q. What is it?

A. It is a piece of BX cable.

Q. And where was that taken from?

A. It was taken from the attic of the Kotzebue Grill off of a switch line.

Q. How far from the trap door to the attic was that?

A. It wasn't very far. Just the exact distance I cannot remember how far. It wasn't too far.

Q. Have you examined the tag on that?

A. Yes sir, I have.

Q. Whose writing is that? A. My writing.

Q. When did you put the tag on?

A. January 2.

Q. When was it taken from the attic?

A. January 2.

Q. January 2? A. Yes sir.

The Court: Can you tell us what it is.

A. I believe it is what they call BX wire.

Mr. Hermann: I would like to offer this. [220]

Mr. Crane: I would like to see that Exhibit if I may, Mr. Hermann.

(Mr. Crane examines the exhibit.)

The Court: Do you mean wire or cable?

A. I believe cable is what they call it.

Mr. Taylor: No objection.

The Court: It may be received.

(Plaintiff's Exhibit L is received in evidence.)

Mr. Hermann: I would like to have this small wire marked for identification.

(Testimony of Archie Adirim.)

Mr. Crane: (To witness) You identified that as BX?

A. I think we got some BX, BX containing wire, BX cable containing wire. I am not sure if that's what they call it.

The Court: That's what you believe it to be?

A. That is what I believe it to be, but I am not sure.

(Two small pieces of copper colored wire are marked for identification as plaintiff's Exhibit M.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit M for identification and ask you if you recognize it? A. Yes sir.

Q. Will you describe it please.

A. A piece of copper wire — a small piece of copper wire. A short piece [221] of copper wire and a longer piece of copper wire, both ends hooked over, and the shorter piece one end, I believe one end has been broken off of it. However, this is the way it was found.

The Court: You mean that's the way it appears?

A. Yes, it appears that way.

Q. (By Mr. Hermann): Would you state exactly where that was found?

A. This long one was found on the end of this (indicating). The wire protruded, or one wire protruded from what we called the BX cable, protruding through that.

Q. Mr. Adirim, I hand you the BX cable, plaintiff's Exhibit L, and ask you to show us how Ex-

(Testimony of Archie Adirim.)

hibits L and M were at the time you found them.

Mr. Crane: Pardon me. May I step around there?

The Court: Yes.

A. As far as I can recall—I am not sure which side of the wire this was on. It was hanging on one side of the wire similar to that (demonstrating), and this piece (indicating) was on the other wire laying below it on the sawdust, this small piece.

Q. (By Mr. Hermann): Whereabouts in the attic was that?

A. Right close to the edge of the trapdoor.

Q. Would you remove plaintiff's M for identification, please.

(The witness does so.)

Mr. Crane: We have no objection to them.

The Court: The exhibit may be received. [222]

(Plaintiff's Exhibit M is received in evidence.)

Mr. Hermann: I would like to move that Exhibit M be received.

The Court: I had already stated that it may be received. It would be quite in order to take a recess at this time. We might make it twelve minutes and reconvene at 3:15 if you will agree to be prompt.

(Thereupon at 3:03 court recessed for approximately twelve minutes.)

(Testimony of Archie Adirim.)

After Recess

(At 3:15 Court reconvened, both counsel stipulated as to the presence of the jury, and all other necessary persons being again present the trial of the cause was resumed. Mr. Adirim resumed the stand for further direct examination.)

Q. (By Mr. Hermann): Mr. Adirim, how much time did you spend in the attic on the 27th?

A. Approximately an hour.

Q. How much on the 30th?

A. Well three or four hours, I would say.

Q. Will you state whether or not you examined the structure of the building? A. I did.

Q. What did you examine it for? [223]

A. I examined it for the place with the deepest char on the building joists, trying to find the center of the fire.

Q. Where did you find the deepest char, if you did?

A. Just on the joist—if I could see these pictures I think I could explain it better, if I could.

Q. I hand you plaintiff's Exhibit G, with the exception of 5 and 6, and ask you if you can show us on any of those pictures where the deepest char was in the building?

A. Right here where my finger is pointing.

Q. What is the number of that picture, Mr. Adirim?

A. I believe it is seven. That's the number on the back.

(Testimony of Archie Adirim.)

Q. Now would you explain from that picture where the deepest area of char is.

A. Right here where my finger is pointing.

Q. Is that finger in the picture on your hand?

A. Yes. That is where it was deepest. We dug down through the sawdust and that is where the deepest char was.

Q. Where was the hoops and soldering iron casing and the waste basket parts found?

A. Right in here (indicating), approximately right in there.

Mr. Taylor: Your Honor, I am going to object to the District Attorney referring to the hoops of a waste basket. I don't know that there is anything in evidence of any waste basket.

The Court: Not with this witness, that is true. Objection will be sustained. [224]

Mr. Taylor: We move it be stricken.

The Court: It may be stricken. I think too, counsel, these pictures, the photographs which were admitted by stipulation, but they have never been explained. I think it would be helpful to have this witness, if he can, explain what they are, or some witness; this whole group with the exception of the two that you had kept out.

Q. (By Mr. Hermann): Mr. Adirim, were you present when those pictures were taken?

A. Yes, I was.

Q. When were they taken?

A. December 30, 1957.

Q. Who took them?

(Testimony of Archie Adirim.)

A. Mr. Pilcher, Harold Pilcher.

Q. Did you see him take each and every one of those? A. Yes sir.

The Court: It wasn't a matter of identification. That is not necessary where they are admitted by stipulation that that matter be explained, but what are they?

A. They are pictures—shall I give them by number?

Q. (By Mr. Hermann): By number if you wish.

A. This picture marked No. 7, is taken up in the attic, showing the entrance to the attic and part of the deepest char.

Q. I see. What is the next picture?

A. This picture is the shot taken showing the switch line and the cord [225] and the upper part in the attic, shooting back toward the east wall, the end wall of the attic.

Mr. Crane: That is number what?

A. Number 4, I believe, Mr. Crane. This picture, No. 3, is shot up towards the roof, showing the damage on the roof. This picture, picture No. 2, was taken shooting toward the west of the building from the back wall, showing the position of the cable, the BX, and the other line that runs in there, and also showing some of the char damage to the building, also taken in the attic. This picture, picture No. 1, was taken in the rear room and shows the trap door and the north wall of the room below the entrance, the ceiling entrance of the back room.

(Testimony of Archie Adirim.)

Mr. Hermann: At this time I would like to let the jury examine the photographs.

The Court: Very well.

(The photographs are given to the jury.)

The Court: Were those taken with flash equipment?

A. Yes sir.

Mr. Hermann: (To the Jury) Would you pass them on as you examine them, to save time.

The Court: I might state to the jury too, that photographs such as this, in the same manner as the plat, are admitted for purposes of illustration.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): Now how long after the alarm went in did you say you arrived at the scene of the fire? [226]

A. Well, I heard the bell at approximately 11:30. I would say twenty minutes to half an hour.

Q. How far is it from the Kotzebue Grill to the Marshal's office in Kotzebue, approximately?

A. Approximately a block or a block and a half.

Q. When you heard the bell ringing did you go out and look to see if there was any fire?

A. No sir, I did not.

Q. Which bell was ringing?

A. I believe it was the Catholic Church bell.

Q. Was it a pronounced ringing or was it an intermittent ringing?

A. No, it rang—it was a pronounced ringing.

(Testimony of Archie Adirim.)

Q. Don't you know that in Kotzebue the pronounced ringing of a church bell or school bell is what we use for a fire alarm?

A. That is the second fire we have had since I have been there. I have heard bells go at other times. I knew they used a bell.

Q. Does the Catholic Church have a mass on Christmas night?

A. I don't know; I couldn't say, Mr. Crane.

Q. Didn't you think it was unusual for a continuously ringing bell at that time of night?

A. No I didn't.

Q. You didn't make any effort to investigate as to what was going on?

Mr. Hermann: I object, your Honor. That's argumentative.

The Court: It is rather argumentative.

Mr. Crane: A fire is the duty of a United States Marshal up there. [227]

The Court: His duty as a matter of law?

Mr. Crane: Not as a matter of law, as a matter of fact in Kotzebue.

The Court: Not a matter of law. I cannot see any point in this inquiry whatever.

Mr. Crane: Very well.

Q. (By Mr. Crane): When you arrived at the fire, was the fire under control Mr. Adirim?

A. I believe it was out, Mr. Crane.

Q. The fire was out. Now—if your Honor will please pardon me if I walk in front here—I hand you plaintiff's Exhibit 1 and ask you what that is —Exhibit B?

(Testimony of Archie Adirim.)

A. They are hoops.

Q. I hand you plaintiff's Exhibit 2 (c) and ask you what that is? A. An oval hoop.

Q. Off of what? A. That I couldn't say.

Q. Could it be off a baby buggy?

A. I don't know.

Q. All you know is that it's an iron hoop?

A. Yes sir.

Q. You don't know. What you do know though, is that it has been through a fire?

A. Yes. It was at the scene and looks like it had been through a fire.

Q. And you don't know what it was on at the time it was charred like this? [228]

A. No sir, I don't.

Q. At just what part of the scene of the fire did you find these hoops? You may use the pictures to illustrate, if you wish. If I may have the pictures, please.

(The pictures are handed to Mr. Crane.)

I hand you plaintiff's Exhibit G. Just where did you find those hoops with reference to the entrance?

A. Approximately right here in this area—may I use my pencil?

Q. You may.

A. Right in about here (indicating).

Q. Were the hoops close enough to the entrance so they could be reached or did you have to go up in the attic?

A. I was up in the attic. I saw them when I was in the attic.

(Testimony of Archie Adirim.)

Q. You didn't observe them until you did go in the attic? A. That's right sir.

Q. How far from the entrance then, in the attic, would you judge the hoops to be when you found them?

A. I would say approximately seven inches, maybe a little more or less.

Q. Then they could have been reached from the entrance? A. I believe they could sir.

Q. I hand you plaintiff's Exhibit D which is a piece of metal and ask you if you know what that is? A. It is an oval shaped piece of metal.

Q. You don't know where it came from?

A. No sir, I don't. [229]

Q. Do you notice the rust on the bottom of it?

A. Yes sir.

Q. Does it look as if it had laid a long time either outdoors or in the water?

A. It could have—I would say the bottom part, sir.

Q. In other words it's not a piece of new material by any means? A. No sir.

Q. Now this cord, I believe you testified where we had it out, that you believed this was a cord to a soldering iron. I will ask you to examine that cord again. Could that be a cord to an electric iron?

A. It could be, yes.

Q. Are you familiar with the upstairs room where this fire occurred?

A. No sir, I am not. I wasn't at the time.

Q. Do you know whether or not there was ever anyone in there doing ironing?

(Testimony of Archie Adirim.)

A. I understand there was one girl used to iron there.

Q. That could very well be an iron cord, could it not? A. Yes.

Q. As a matter of fact it could be a cord to a percolator, couldn't it? A. Yes sir.

Q. Or the cord from a toaster? A. Yes.

Q. In other words, when you said it was connected with the soldering iron——

A. I didn't say it was connected to the soldering iron, Mr. Crane. [230] I don't believe I did.

Q. When you found it was it in the shape it is now? A. No sir.

Q. What shape was it in when you found it?

The Court: You may see the pictures.

Q. (By Mr. Crane): Surely you may see the pictures.

A. I think it was in one of those pictures that are not admissible, I believe. I will try and explain. I don't know whether I can explain just the exact shape.

Q. Where did you find that cord?

A. On the bottom of a canned goods box.

Q. Then you didn't find that cord at the scene of the fire?

A. In the downstairs room, yes sir.

Q. Not up in the attic necessarily?

A. It was in the downstairs room.

Q. The downstairs room? A. Yes sir.

Q. Then this cord—do I understand you picked this cord up downstairs in the restaurant?

(Testimony of Archie Adirim.)

A. No sir. No sir. On the upstairs floor in the back room.

Q. How far away from the fire area?

A. Probably, I would say six or seven feet, approximately that, approximately.

Q. Was it concealed in any way? [231]

A. There was a box on top of it, yes sir. There was one end hanging up over it. Just what end it was I forget.

Q. Can you see any evidence of fire on that cord?

A. I believe it is burned on this end, Mr. Crane.

Mr. Hermann: Will you speak a little louder, please.

A. I say, I believe it has been burned on this end.

Q. (By Mr. Crane): Could that be burned from use—doesn't that appear to be quite an old cord? I will put it this way: with reference to other articles burned in the building, the soldering iron, whatever you testified to, does that show any evidence of being burned?

A. No sir, the whole cord doesn't. The whole cord doesn't show evidence of being burned.

Q. Now defendant's Exhibit E, for identification, I will ask you where you found that?

A. May I use the pictures again?

Q. Yes, go ahead.

A. Right in just about here (indicating).

Q. Hold it up so the jury can see.

A. Approximately in this locality right here.

(Testimony of Archie Adirim.)

The Court: Well now, you should mark that somehow. Put an X on it.

(The witness marks the exhibit.)

Mr. Taylor: If your Honor please, I would suggest on illustrating with a small picture that way, it might be available to the witness [232] to step over in front of the jury.

A. I am marking No. 7.

The Court: Yes. You may step over and point it out to the jury.

(The witness does so and then resumes the stand.)

Q. (By Mr. Crane): Now again asking you about this soldering iron I would like to have you read to the jury the number, the make and anything, any identifying marks on that soldering iron, as to voltage and amperage and whatever it is.

A. Soldermaster, W 55 NO, following that then it says V 115, 55 B, Hexacon Electric Co., Roselle Park, N. J. Underneath the word Soldermaster, there is again the Hexacon Electric Co., Roselle Park, N. J.

Q. Then that is a 55 watt, 115 volt iron, is it not? A. I believe it would be, yes.

Q. Now where did you find this piece of material with reference to the iron?

A. This what?

The Court: This piece of material, counsel?

Mr. Crane: I beg your Honor's pardon.

Q. (By Mr. Crane): Exhibit I, where did you find that with reference to the other exhibit, E, I believe.

(Testimony of Archie Adirim.)

A. In the downstairs room below, the room where the ceiling entrance is. May I look at these pictures again? By downstairs, I mean below the [233] upstairs back room.

The Court: You don't mean the ground floor?

A. No sir. The second story, just below the ceiling entrance.

Q. (By Mr. Crane): All right. Then you did not find the element of the iron at the place of the fire where you found the soldering iron?

A. No sir, not in the same location, no sir.

Q. Were they in the same building?

A. Yes sir.

Q. In the same room?

A. Well, the soldering iron was upstairs in the attic, that is, the casing.

Q. And the element was where?

A. Just below. In the room just below the ceiling entrance on the second floor.

Q. How do you know then, that those are pieces of the same instrument?

A. I don't know that they are pieces of the same instrument sir.

Q. Very well. Handing you plaintiff's Exhibit J. You say there is a brown stain on it. Isn't there also a pink stain or a red stain?

A. Yes. I think this stain right here, this stain right here (indicating).

Q. Couldn't that pinkish stain very well be from lipstick used up there in the room?

A. Yes, it could be.

(Testimony of Archie Adirim.)

Q. Where did you find that piece of material?

A. Back right in about here sir, in that general locality (indicating). [234]

The Court: Would you point that out to the jury please. You could step over there, if you will.

(The witness points out the place indicated to the jury and then returns to the stand.)

Q. Right there, your Honor.

The Court: Yes.

Q. (By Mr. Crane): You probably notice, Mr. Adirim, that my hands are quite soiled from using that exhibit, are they not?

A. I believe so, yes.

Q. Then wasn't that exhibit put in there after the fire?

A. That I couldn't say sir. I don't know.

Q. What is the purpose of this piece of toweling then?

A. I take it to show that it was found in the attic; but what it's purpose was I don't know.

Q. If it had been in there at the time of the fire why wasn't it burned up?

A. Well, if you will notice here, Mr. Crane (indicating), it does look like it is burned over here, how I wouldn't say—whether it was in there before the fire or after the fire.

Q. You are not inferring, by any chance, whether it was there before the fire or not, are you? A. I don't know.

Q. Wasn't there many men up there that night during the fire? [235] A. Yes.

(Testimony of Archie Adirim.)

Q. Several people working around there?

A. Yes sir.

Q. Towels in the bathroom?

A. Yes sir.

Q. Couldn't anybody have gone in there and got a piece of towel and wiped their hands as they were working around?

A. As far as I know sir.

Q. Could it have been somebody with you?

A. I don't believe so sir.

Q. Wouldn't it be quite likely for an electrician cutting the wire to use a paper toweling?

A. He probably could have, yes.

Q. Now we will come to these pieces of cable. I believe they are plaintiff's Exhibit L, which I believe has been identified as a piece of BX. I will ask you to examine these pieces of BX and examine particularly this end of it, and see if it isn't just as much burned on the inside as it is on the outside?

A. I can't see down in this too far, but what I can see it is just as much burned, yes sir.

Q. In other words, the wire could have shorted out and burned inside of the cable?

A. As far as I know it could have.

Q. Where did you find this piece of BX, if you will show the jury?

A. Now I am not too sure in my own mind where that was, Mr. Crane, [236] although it was somewhere near the trap door.

Q. Somewhere near the trap door?

(Testimony of Archie Adirim.)

A. Yes sir.

Q. Was it connected to anything?

A. This piece of cable was running back to the light switch, ran back to it.

Q. At the time you took it, was it connected to the light switch? A. I believe it was, yes.

Q. Then you disconnected it from the light switch when you took it out? Is that correct?

A. Had it sawed off right here, as I recall, yes.

Q. Where is the rest of the cable?

A. I imagine it is still in the building.

Q. In other words, you cut off the stapled end from the—extending from the light switch through the fire area—did you get all of the BX that was in the fire area?

A. I believe there is another piece.

Q. Do you have it here with you?

A. I believe it is here. I believe it is in the evidence locker sir.

Q. Can you produce it?

A. I believe I can, yes.

Q. If you can, Mr. Adirim, will you point out on the picture where the switch is located that this BX was tied on to.

A. I don't believe it's in the picture, Mr. Crane. No sir. It is on the outside wall as you enter this room, this upstairs backroom, just before you enter the room. [237]

Q. If you would show us, please, on the exhibit about where the switch would be so we can understand the hookup——

(Testimony of Archie Adirim.)

A. It is not in the picture at all, but as you come in the door leading to it, on the right-hand side, on the outside of the room.

Q. And that Exhibit 1 from Exhibit G, Exhibit G-1. That's what I wanted you to explain, Mr. Adirim. Now where you come into the building, is this light switch then concealed?

A. To the attic—yes, sir; I believe it comes up through the wall and over to the attic on the joist there (indicating).

Q. Do you know whether or not that is BX or did you examine it?

A. Yes. There is BX to the switch.

Q. Then the BX goes up into the attic—how far is it from where it enters the attic to the scene of the fire?

A. From where it enters the attic to the scene of the fire?

Q. Yes. To the area of the fire.

A. This is just an approximation——

Q. Yes, that is what I expect.

A. From where it comes out from the wall over to the fire area I would say about six feet, maybe a little more and maybe a little less, but somewhere in that neighborhood.

Q. Then there is probably four or five feet of wiring in the attic? Is that correct or, correct me if I am wrong. How many feet?

A. Well now I couldn't say how many feet.

Q. Well now, did you cut off all of the BX that was laying in the fire area?

(Testimony of Archie Adirim.)

A. I believe so. [238]

Q. Now I will ask you this: was this piece of BX laying in the area where the deepest char is shown?

A. Yes. Just where it was laying right over in here (indicating).

Q. You mean the deepest char was right here (indicating)?

A. No, I believe it was following right in around here.

Q. Part of the BX cable ran through the deepest char area, is that correct?

A. I believe so, Mr. Crane, but I wouldn't say for sure.

Q. Now, Mr. Adirim, just as a matter of common knowledge, a piece of toweling wouldn't ordinarily be black with soot and anything from the fire, if it had been used in an attic that there was no fire in, would it? A. I don't know.

Q. Well that soot could only get on there from the fire, couldn't it?

A. I don't know how it got on there, Mr. Crane.

Q. Now you say you smelled gasoline?

A. Yes sir.

Q. What does gasoline smell like?

A. Well, it is hard to explain the way it smells.

Q. What I mean, what I am getting at is this: isn't there a difference between the odor of plain gasoline, gasoline and blazo that comes from an exhaust pipe when it is being burned?

A. I don't know. I never—after being burned I never have noticed.

(Testimony of Archie Adirim.)

Q. Well you testified here that you smelled gasoline in the bottle.

A. Yes. But that wasn't coming from an exhaust pipe either.

Q. Where was it coming from?

A. That was coming from the sawdust after we dug it out. [239]

Q. Did I understand you to say this sawdust was frozen? A. Yes, it was.

Q. Does gasoline freeze?

A. I don't believe it does.

Q. Does fuel oil freeze?

A. I don't believe so, unless it has water in it.

Q. How could you tell this was frozen?

A. That came from the bottom. The top was frozen where the water was. From the botton laying on the ceiling—plywood formed the ceiling—is where we got that. We had to dig through.

Q. Do you mean to tell me, Mr. Adirim, that you can smell any gasoline, fuel oil or petroleum-like odors from that thing?

A. Yes sir. I can smell a faint odor I believe.

Q. A faint odor of what?

A. Just what I don't know, but some kind of petroleum products.

Q. Doesn't it smell more like fuel oil than, did you say, gasoline?

A. I don't think so, Mr. Crane.

Q. As a matter of fact, Mr. Adirim, isn't the whole attic insulated with sawdust? A. Yes.

Q. Isn't it insulated with sawdust Ferguson hauled in on oil barges?

(Testimony of Archie Adirim.)

A. I don't know who hauled it in. I wasn't there then.

Q. Now what you smell there is burned petroleum? A. I couldn't swear to it, no sir.

Q. Well, what I am getting at, from what you are testifying to there, [240] petroleum was burned. Why do you say there is an odor of gasoline?

A. In my opinion——

Q. In other words, you are guessing it's gasoline.

A. Well, I believe I can smell it in there, Mr. Crane.

Q. You believe you can smell it? Do you believe at this time that you can smell gasoline in that jar?

A. I believe I can smell a faint odor of it, yes.

Mr. Crane: Has the jury smelled this yet?

The Court: The exhibit was passed around to the entire jury.

Mr. Crane: Very well.

Q. (By Mr. Crane): I asked you a minute ago if you had found another piece of BX cable in the fire area? A. Yes sir.

Mr. Crane: Have you any objection to him putting it in, Mr. Hermann?

Mr. Hermann: No. I think the deputy can get it for him.

The Court: Can you get it please, Mr. Levine? Can you proceed meanwhile with something else, counsel? It might take him a few minutes to find it. Can you go ahead with something else?

Mr. Crane: I wasn't going to finish with this witness until I got into that.

(Testimony of Archie Adirim.)

The Court: Very well.

Mr. Crane: While we are waiting for that, I might take up these two short wires. [241]

Q. (By Mr. Crane): Handing you plaintiff's Exhibit M, I will ask you first where you found these?

A. This long wire (indicating) was found connected to one of these wires. It was hanging—just what side it was hanging on, I really don't know. And this one was below it on the sawdust, this part here was hanging (indicating).

Q. Are these the same texture of wire, as far as you can tell?

A. I am not sure whether this one comes off there—I don't know.

Q. Now as I understand you, you say they were hanging like that (indicating)?

A. Yes sir. The BX wasn't vertical; it was laying across the joists.

Q. When you found them, the BX had burned off and this wire was connected like this (indicating)?

A. No sir. It wasn't connected to anything, just laying or hanging there.

Q. Do you mean hanging?

A. Yes. Just like that (indicating).

Q. When you found it in the attic, the piece of BX extended from the wall to the fire area and through the fire area, did it?

A. Yes sir, from the switch line.

Q. And this was hanging on it?

(Testimony of Archie Adirim.)

A. Yes sir.

Q. You couldn't tell then from your examination whether they had ever been connected?

A. No sir, I don't know.

Q. But it was still hanging there? [242]

And the other piece was a piece of loose wire?

A. Yes sir.

Q. Now they were laying flat, along like this (indicating)?

A. Yes. They were laying across the floor here, just about the way this piece of wire is laying.

Q. All right. Now where did you say this other piece of BX came into?

The Court: It has just been brought into court.

Mr. Crane: May I have it, please. If the plaintiff doesn't care to introduce it, I will ask that it be marked as defendant's exhibit for identification.

The Court: Yes. Very well.

(A piece of BX cable is marked for identification as defendant's Exhibit No. 9.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 9 for identification and ask you first if you know what it is?

A. Yes sir. A piece from the main power line.

Q. From the main power line?

A. Yes sir.

Q. Where did you get this piece?

A. That was off of the main power line itself.

Q. Well, was this piece connected onto plaintiff's Exhibit L?

A. This piece—no sir. It was a separate line.

(Testimony of Archie Adirim.)
This is the switch line (indicating), and that is the main power line (indicating). [243]

Q. This, then, is the line that came into the building, a separate line coming in off of a trunk, that came upstairs and supplies power upstairs? Was this line found in the fire area?

A. Part of it was, I believe sir.

Q. Show me what part was found in the fire area?

A. I believe it was this end right here (indicating).

Q. Well, now, did it have these holes and punctures in it when you found it?

A. Yes, it did.

Q. And had these holes or punctures or anything been burned when you found it?

A. It looked like it had been burned, sir. I couldn't say whether it went through the fire or not. I don't know.

Q. This is the connection that is between the power and the BX that runs through the fire area? Is that correct now? A. Yes sir.

Q. Then what we have here in evidence now, is the line coming from the outside into the BX that ran through the fire area, that was laying in the attic?

A. You mean this piece (indicating)?

Q. Yes.

A. No sir. That comes from the switch.

Q. Does this line (indicating) go into the switch?

(Testimony of Archie Adirim.)

A. No sir. The way we found it, somebody had cut the power off. I believe you have heard about that from some other witness. That was cut and [244] came over from the main branch where the power comes up into the attic.

Q. Was this wire in any way connected with this wire (indicating)? A. No sir.

Q. But this was in the fire area (indicating)?

A. Yes sir.

Q. But there was no connection between the two? A. As far as I know, no sir.

Q. All right. I will ask to introduce this into evidence.

Mr. Hermann: No objection.

The Court : It may be received.

(Defendant's Exhibit No. 9 is received into evidence.)

Q. (By Mr. Crane): Now I will ask you if this defendant's Exhibit 9 or plaintiff's Exhibit L were in any way connected with or up to this cord?

A. No sir.

Q. Were they connected to any wires that might lead to that cord?

A. There was some more wires that we found.

Q. Connected to what?

A. Connected to nothing sir. No connections.

Q. Then will you answer my question.

A. Will you repeat it, please.

Mr. Hermann: We object on the grounds it doesn't show what time. [245]

Q. (By Mr. Crane): And the time you found

(Testimony of Archie Adirim.)
it—I understand this was all on the 30th of December, was it not?

A. Yes sir. On this wire, yes sir. No sir, it wasn't connected at the time it was found.

Q. All right. When you went in the building on the 30th of December and took your samples did you find any wires connected or to a switch to plug into?

A. Will you repeat that, Mr. Crane, please?

Q. Maybe I didn't make it clear. Handing you plaintiff's Exhibit H, was plaintiff's Exhibit H connected into any switch or to a plug, into any plug, or tied into any wire in the building?

A. Not when I found it, no sir.

Q. Did you ever see it connected in at any other time? A. No sir, I never did.

Q. Did you ever see or find any of these wires in evidence, ever connected to this soldering iron?

A. No sir.

Q. And you found this, you found plaintiff's Exhibit E in the attic, did you?

A. The soldering iron?

Mr. Hermann: I would like to object. Counsel is not cross examining but merely repeating everything that has previously been testified to.

The Court: That is his privilege if he wishes to do so. Objection overruled. [246]

Q. (By Mr. Crane): Now you say—did I understand you to testify that you found this stuck between the joists in the fire area?

A. Yes sir, laying down in the general area that

(Testimony of Archie Adirim.)

I showed you there, right in around here (indicating).

Q. All right. I will ask you to examine it again, rub your hand on it, wipe it off, make any test you want to of it, and see if you can find any of the smoke of the fire or soot on it?

A. No sir, I can't.

Q. As a matter of fact, from the appearance of it, that has never been through a fire, has it?

A. It's blue in places, but I couldn't tell you if it had ever been through a fire.

Q. The only part that shows heat is the soldering part——

A. Well it shows blue marks up here (indicating) that could have been caused by heat, but I don't know whether they were or not.

Q. How did that get in the attic then, if you know? A. I don't know sir.

Q. Now defendant's Exhibit I, you say you believe is the element of a soldering iron—I believe that is your testimony—and you found that in what part of the building?

A. That was in the upstairs back room laying on the bed.

Q. Can you see any evidence of fire on that soldering iron otherwise than the burned area just on the tip of the element? A. No sir. [247]

Q. Does that look like that piece ever went through a fire?

A. I don't know whether it did or not.

Q. Take a look and see.

(Testimony of Archie Adirim.)

A. I really don't know. I never have seen an element go through a fire so I don't know.

Q. Do you see any evidence of burns on it or anything? A. No sir.

Q. In other words, it's shiny and new?

A. No sir—yes.

Mr. Crane: May I pass these two exhibits to the jury?

The Court: I believe it would be well to take a recess for a few moments at this time. Ten minutes ought to be sufficient or twelve, say.

(Thereupon court recess for approximately ten minutes.)

After Recess

(At 4:20 p.m. court reconvened and the trial of this cause was resumed. Both counsel stipulated as to the presence of the jury and all other necessary persons were again present. The witness on the stand at recess resumed the stand for further cross examination.)

Mr. Crane: I believe just before recess, your Honor, I asked permission to pass these two articles to the jury, and asked the [248] witness to examine them to see if they had been through a fire or not.

The Court: Very well.

Q. (By Mr. Crane): Now calling your attention again to plaintiff's Exhibit L, I will ask you to examine that with the connecting wires as you found it, wouldn't a connection of that kind cause that wire to short circuit?

(Testimony of Archie Adirim.)

A. I don't know, Mr. Crane.

Q. You do not know?

A. No sir. I really don't.

Q. I will ask you if it isn't a fact that from the appearance of the exhibit, it would have been short-circuited and caused a fire, from the appearance of the exhibit?

A. I don't know. I don't know too much about wiring, and I really don't know. I couldn't see too far down in there.

Mr. Crane: That's all, your Honor.

Redirect Examination

Q. (By Mr. Hermann): Mr. Adirim, have you ever at any time seen any other Soldermaster soldering irons? A. Yes sir, I have.

Q. Did you examine that other Soldermaster?

A. Yes sir.

Q. What, if anything, was attached to the thread at the end? A. There was a handle.

Q. What kind of handle?

A. Wooden handle.

Q. Did you ever at any time see any evidence at the scene of the fire of a wooden handle such as that? [249]

A. No sir, I did not.

(There were no further questions and the witness was excused from the stand.)

Mr. Hermann: We are prepared to proceed but our next witness will take in excess of an hour.

The Court: Well, I would prefer if we go on

awhile because we are proceeding rather slowly and our time is running out.

EDWARD J. HARKABUS

is called and sworn as the next witness for the plaintiff and thereupon testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Harkabus, would you tell the Court and jury your full name?

A. Edward J. Harkabus.

Q. What is your occupation, Mr. Harkabus?

A. I am an arson investigator, a Special Agent with the National Board of Fire Underwriters.

Q. Would you explain what type of organization the Board of Fire Underwriters is.

A. The National Board consists of approximately 244 members, capital stock companies, who do engineering work, and who check on all home appliances to see that they are safe for home use, and in addition to that, I happen to be assigned to the arson department of the National Board.

Q. Would you please state your qualifications and length of employment.

A. I was a Special Agent with the FBI for a little over six years and I have been employed by the National Board for approximately four years. While in the FBI I had occasion to conduct cases, investigations concerning arson cases, and since I have been employed by the National Board I have investigated several hundred fires. I am also Deputy Fire Marshal for the Territory of Alaska. I

(Testimony of Edward J. Harkabus.)

conduct arson investigations throughout the Territory at the requests of fire chiefs, police chiefs or other officials who make a request of us.

Q. Have you had any special training in that field? A. Yes, I have.

Q. What did it consist of?

A. I have attended several seminars, one at U.S.C. at Berkeley, and I have been assigned with other special agents of the National Board to gain experience in this field of investigative work.

Q. Have you ever taught as a fire investigator?

A. I have.

Q. Where?

A. Primarily throughout the Territory of Alaska at various police schools sponsored by the FBI; and the Territorial Police and Marshal's office, city police departments and fire departments.

Q. Would you please state whether or not you belong to any professional organizations in that field?

A. I belong to the International Association of Arson Investigators and last year was Vice President for Alaska.

Q. Have you had any experience appraising the value of real or personal property?

A. During the course of investigations I do appraise the relationship [251] to the value of the structures involved or items involved.

Q. Would you please state whether or not you investigated a fire at the Kotzebue Grill?

A. I did.

(Testimony of Edward J. Harkabus.)

Q. On what day?

A. On December 30, 1957.

Q. What type of investigation did you conduct?

A. Well, I was requested by the United States Marshal's office here in Nome to conduct an investigation, a cooperative investigation with them, to determine the origin of the fire which occurred at the Kotzebue Grill.

Q. What was the first thing you did in that respect?

A. The first thing I did was to contact Deputy United States Marshal Archie Adirim to ascertain some of the circumstances surrounding the fire.

Q. What did you do after you had done that?

A. After I did that, I went to the Kotzebue Grill and interviewed Joe Brantley. Subsequently, after ascertaining from Deputy Marshal Adirim that the fire had occurred in close proximity to the attic in the Kotzebue Grill in the rear room, we went to that area.

Q. When you say "we", whom do you mean?

A. Deputy Marshal Adirim and myself.

Q. Who, if anybody, admitted you to the Kotzebue Grill? A. Joseph Brantley.

Q. Would you briefly describe what type of investigation you conducted in the attic?

A. Well, I conducted a physical investigation of the fire scene initially, in order to establish the point of origin of the fire. I eliminated the heating elements in the room such as stoves and any heating appliances [252] as the probable cause of

(Testimony of Edward J. Harkabus.)

the fire. I eliminated the spontaneous ignition based on extreme temperatures. The temperature, by the way, was 37° below zero at the time of the fire, according to the Weather Bureau reports. And I conducted an investigation in the attic area checking out the electric system and eliminated that as a cause of the fire. I established that—well, maybe I had better tell you how I did it.

Q. Yes.

A. Now starting with the stoves, I eliminated the stove as a cause of the fire. The stove was nowhere near the place where the fire originated. There is only one stove in this rear room.

Q. How did you eliminate the electric conduit?

A. Well, I eliminated the conduit in this manner:——

Mr. Taylor: Just a minute, your Honor. I am going to object to any further testimony along this line until it is shown that the electrical apparatus, wiring, BX or other conduit were in the same position as they were at the time of the fire.

The Court: Well, this witness would hardly be in a position to establish that. I think it has been sufficiently shown by other witnesses, except for what was removed by Mr. Little and a cord which someone of the boys removed.

Mr. Taylor: I think the testimony is that Mr. Little had cut away some of the wire.

The Court: Yes, that is true.

Mr. Hermann: I believe the testimony was that he had severed it, just cut it. [253]

(Testimony of Edward J. Harkabus.)

The Court: Yes. To get lights in the building. I do not think that factor would make the opinion of the investigator any less admissible. It is a circumstance which may be considered along with his testimony. Objection overruled.

A. Would you repeat the question, please?

(The reporter reads the previous question as follows:

"Q. How did you eliminate the electric conduit?")

A. The conduit, actually there were four—you don't have a blackboard here, do you?

The Court: We do have, but it is in the back room. It's in pretty bad shape. I doubt if it could be used.

A. Maybe I can explain orally then. There was one line, the power line, that entered; where Mr. Little cut the line was on the other side of the wallboard in the attic, but the BX was still in position in the attic at the time I inspected it.

Q. Would you describe the position it was in in relation to the building.

A. Well, it would be running east and west. It fed four outlets in the back room, and there was a switch line that would have been on the right-hand side of the room as you face toward the rear, which is the east section of the building. That is my recollection. I could be mistaken on the directions. But the BX leading to the main power line lead to two switches on the left-hand side of the building and a five-strand wire on the right-hand

(Testimony of Edward J. Harkabus.)
side of the room, and from the switch line there was BX cable that ran over to this other circuit going into the power source. The point of origin in relation to [254] the four outlets was near the trapdoor, and although there was a short circuit in the BX it did not cause the fire.

Q. How did you determine that the short circuit in the BX did not cause this fire?

A. The short circuit in the BX was beyond the point of origin in the fire toward the power source.

Q. Would you explain how you determined the point of origin of the fire?

A. I determined the point of origin in the following manner: I interviewed Deputy Marshal Adirim and asked him where he had discovered the metal ring which he had shown me. He pointed out a place adjacent to the rear socket on the left-hand side as you walk in as being in close proximity to where he discovered the soldering iron case and the ring, the oval shaped ring. One was a solid ring and the other one, which coincided with the base, was open on top, and then a circular—if you have them here perhaps I could identify them, sir.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit D and ask you if you can identify that?

A. This appears to be the ring that was shown to me by Deputy Marshal Adirim, and I note here on the back there is the initial or letter H. In furtherance of this, while we were conducting the investigation, I checked a wastebasket that was on

(Testimony of Edward J. Harkabus.)
the premises of the Kotzebue Grill and in every respect according to the diameter of this solid piece of metal, it coincided exactly with that, with the wastebasket bottom.

Q. I hand you plaintiff's Exhibit C and ask you if you can identify that. [255]

A. Well, this appears to be similar to the ring which was shown to me at that time and which I compared to the top portion of the wastebasket in the Kotzebue Grill.

Mr. Taylor: Just a minute, your Honor. I am going to object and ask that this testimony be stricken on the grounds that the wastebasket with which he made the comparison, your Honor, I think should be here in the courtroom for the purpose of showing the jury that it was a ring off of a wastebasket or a similar ring.

The Court: Again you are objecting to the weight of the evidence and that is not proper. That again is a question for the jury. Objection overruled.

Q. (By Mr. Hermann): I hand you plaintiff's Exhibit B for identification and ask you if you have ever seen that before and where?

A. These appear to be similar to the rings that were displayed by Deputy Marshal Adirim at the time I conducted the investigation, and I compared them with a one gallon ice cream container which was in the same room with the waste basket and similar to that container on the floor which I see here.

(Testimony of Edward J. Harkabus.)

Q. Would you proceed then to explain how you determined the origin of the fire.

A. In addition to these there was displayed to me by Deputy Marshal Adirim a soldering iron casing which he found in proximity to the rings.

Q. Then when you were making the investigation did you assume that the rings and the flat metal part and the soldering iron casing——

Mr. Crane: If your Honor please, I object——

The Court: Just a minute. He hasn't finished the question yet.

Q. (By Mr. Hermann): ——were in the position that Mr. Adirim described to you?

Mr. Crane: That is objected to, your Honor, as leading and suggestive. I realize that leading questions may be asked expert witnesses, if the man is qualified as an expert and is used as an expert witness.

The Court: Well, all right.

Mr. Crane: Has he been qualified as an expert?

The Court: I think so, sir.

Mr. Taylor: He is making reference to something not in evidence, reference to what somebody told him.

The Court: Well that is proper. Hypothetical questions may be posed to any one who is qualified as an expert in any field based upon certain assumptions which may be otherwise in evidence. That is a fundamental rule of evidence. Objection overruled.

A. I did.

(Testimony of Edward J. Harkabus.)

Q. (By Mr. Hermann): What, if anything, did you examine to determine the point of origin of the fire?

A. In the location where these had been pointed out to me where these had been placed, I dug into the sawdust at that point and sampled the area surrounding where these rings had been, or I understood these had been found. And at that point I dug up some of the sawdust, which had a smell of inflammable [257] fluid, and at that time I pointed it out to Deputy Marshal Adirim and United States Marshal Oliver and another man who wasn't identified to me, but I believe his last name was Kowunna, who was there. I took a specimen, put it into a clean container which I cleaned myself, so I know it was not contaminated, and it was subsequently placed into a jar which had been cleaned and identified with my initials and by the initials of the United States Deputy Marshal Adirim. This had an odor similar to gasoline.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit K for identification and ask you if you are able to identify it.

A. Well I notice that my initial and signature is on the jar and the odor is the odor I smelled at that time, or similar to it. This sawdust was taken from the bottom portion on the plywood and at the time it was recovered it had a coating of water on it because of the fire fighting that had apparently occurred, but the odor was much stronger at that time than it is now, of course, since it evaporates.

(Testimony of Edward J. Harkabus.)

Q. What else, if anything, did you examine or investigate to determine the point of origin of the fire?

A. Well, I examined the portion directly above the point of origin, and the roof joists were charred there very deeply, in fact they had been burned away completely; and directly above the point which I considered to be the point of origin I noticed that the char pattern was heavier there or alligatoring.

Q. What does the word "alligatoring" refer to?

A. It refers to a piece of charred wood and is just the effect of the deep char on the wood. And I checked the depth of the char in relationship to other areas of the roof. And based on the fact that the roof joists at [258] the top of the eaves were completely charred, in my considered opinion that was the point of origin of the fire.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit E for identification and ask you if you recognize it? A. I do.

Q. Where have you seen it before?

A. This is the soldering iron displayed to me by Deputy Marshal Adirim and that he had found with the rings at the same point we discovered this sawdust.

Q. When was it displayed to you?

A. I beg your pardon.

Q. When was it displayed to you?

A. It was displayed to me on the 30th day of December.

Q. Do you know how hot a temperature a soldering iron of that kind can get?

(Testimony of Edward J. Harkabus.)

A. The temperature range of a soldering iron of this type, which is a 55 watt and 115 volt, is between 900 and 1800 degrees fahrenheit. That is based on reference and on checking other irons of a similar type.

Q. Do you know the kindling temperature of gasoline? A. I beg your pardon.

Q. I asked, do you know the kindling temperature of gasoline.

A. Kindling temperature wouldn't be a correct term in relation to gasoline, sir. In flammable vapors are given off from gasoline and has what is called a flash point at minus forty-five degrees, but the ignition temperature of the gasoline would be four hundred ninety-five degrees fahrenheit.

Q. Would you explain the difference between the flash point and the ignition point of gasoline.

A. Well, a flash point is confined—at which time flammable vapors are given off from a liquid. To simplify it, you all know gasoline vapors would disseminate from an open pail, and the ignition temperature to ignite these vapors would be 495 degrees.

Q. In your opinion would you state whether or not a soldering iron would achieve a high enough temperature to kindle gasoline?

A. Based on a range of temperature between nine hundred and eighteen hundred, it is well within the range of the ignition temperature of gasoline which is five hundred degrees.

Q. Do you know the ignition temperature of sawdust?

(Testimony of Edward J. Harkabus.)

A. Approximately five hundred degrees.

Q. Is that within the range of a soldering iron?

A. It is.

Q. Do you know what the kindling temperature of paper is?

A. Well roughly the kindling temperature of paper is within 446 and 450 degrees.

Q. Is that within the degrees of a soldering iron? A. Yes, sir.

Q. What determines the degree a soldering iron must achieve?

A. Well on this basis, if a soldering iron is to be used for soldering, obviously it has to have enough heat to melt tin and lead, which is the basis of most solder. Then if he is to melt tin, it would be about 1100 degrees fahrenheit, and lead would be somewhere around 660. Therefore it would have to be within the range he is using it. As outlined previously you can bring [260] it within various ranges depending on what type of soldering you had, whether it is aluminum, lead, or whatever it may be.

Q. What else, if anything, did you examine in the attic at the scene of the fire to determine the point of origin of the fire?

A. Well, in the back room there was an electric cord which was adhering to a case of canned goods, frozen to it, and that was located near a daybed in the backroom. And upon the daybed was a heating element and an extension cord. Those were

(Testimony of Edward J. Harkabus.)
photographed in position and photographs taken at my direction.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit I and ask you if you have ever seen it before and if so, where?

A. This is the same heating element I observed on the daybed in the rear room of the Kotzebue Grill on the second floor, and I identify it because I have my initials on it and the sate, as well as the initials of Archie Adirim and U. S. Marshal Oliver.

Q. Do you know that is an element of a soldering iron?

A. I am familiar with the heating elements of soldering irons, and one of the ways you can tell is to slide it into the soldering iron casing and it fits. We had the casing and there was no other heating element that we discovered at the scene incidentally.

Q. How did you happen to discover this cord which you described?

A. Well, the cord, as I mentioned, was frozen to a crate or a case of canned goods and it was—I can't recall off-hand but I do believe there was another box or something laying over the top of it. But we discovered it and it was photographed in the frozen position on the box, also at my direction. [261]

Q. Mr. Harkabus, I hand you plaintiff's G-5 and G-6 for identification and ask you whether you can identify them.

(Testimony of Edward J. Harkabus.)

A. G-5 is a photograph of the heating element and extension cord on the daybed, taken facing south.

Q. Whose writing is that?

A. That is my handwriting on the back of the photograph.

Q. On what occasion did you put your handwriting on the back of the photographs?

A. I put my handwriting on primarily for identification and my own information. These photographs were taken by Harold Pilcher.

Q. Were you present when he took them?

A. I was.

Q. Does this accurately represent the scene you saw at the time? A. Yes, sir.

Q. What became of those pictures after they were taken?

A. After they were taken by the photographer, the exposed film with the film packs were turned over to me by the photographer, and I took them to Fairbanks when I left Kotzebue and had them developed.

Q. You had them developed? A. Yes, I did.

Q. Will you state whether or not you were present when they were developed?

A. I was not, but I checked the negative against the photographs.

Q. Do you have the negatives? A. I do.

Q. Now how about the other photograph, is the same true of that?

A. Exhibit 6, the same is true of that. This is

(Testimony of Edward J. Harkabus.)
a photograph taken facing south showing a soldering iron cord remnant frozen to a box or case of canned goods.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit G-1, 2, 3, 4 and 7 and ask you if you recognize them?

A. Yes, I do. G-1, was taken in the rear room showing the trap door and light fixture, and the picture was taken facing the north wall. G-2 is a photograph taken in the loft facing west showing the power line to the switch, which is BX, and also the power source. Additionally it shows the rear partition where the line had been cut by Mr. Little, I believe it was. G-3 is a photograph taken in the loft showing the charred part or pattern of the roof, the eaves directly above the point of origin of the fire. G-4 is a picture taken in the loft facing the rear of the building, which would be east, showing BX and the five strand wire which was in the loft or the attic. G-7 is a photograph showing the point where the gasoline, where I discovered the gasoline, as well as——

Mr. Crane: Just a moment, please. I am going to object to the last statement and ask that it be stricken because Mr. Harkabus has not testified as to his discovery of any gasoline.

The Court: He referred to gasoline, did you not?

A. Well, sir, as I recall, what I smelled at that time had an odor similar to gasoline.

Q. (By Mr. Hermann): You didn't discover any gasoline though? [263]

(Testimony of Edward J. Harkabus.)

Mr. Taylor: Only you got something to smell like gasoline in the sawdust?

A. Yes, sir. It shows the charred pattern adjacent to the point of origin and shows the point where we discovered the sawdust.

Q. (By Mr. Hermann): Would you place those together, please. And what do Exhibits G-5 and G-6 show?

A. I believe I have already explained those, sir.

Mr. Hermann: At this time I would like to move that Exhibits G-5 and G-6 be introduced as evidence.

The Court: Those are the same ones which we eliminated from the stipulation?

Mr. Taylor: Yes. We have no objection.

The Court: They may be received.

(Plaintiff's Exhibits G-5 and G-6 are received into evidence.)

Mr. Hermann: I would like at this time to allow the jury to inspect these two photographs.

Mr. Taylor: There is considerable writing on the backs of them, your Honor, but we do not object to that.

The Court: Mr. Harkabus, you stated that was your writing?

Mr. Taylor: As I said, we do not object to them.

The Court: Very well. When the jury has completed their inspection of these exhibits it would appear to be time for adjournment for the day, if there is no objection.

Mr. Taylor: We have no objection, your Honor.

No. 16,231

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIVIDAD SALINAS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

On Appeal from the District Court of the United States for the District of Alaska, Second Judicial Division.

BRIEF FOR APPELLANT.

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FILED
JUL - 1 1959
PAUL P. O'BRIEN, CLERK

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In the absence of the indictment specifically pleading the offense of arson in the second degree, the jury was not justified in making such finding 2

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ACLA 1949, as duly amended by Chapter 141 of the 1957 Session Laws:

Section 65-5-1 2

Section 65-5-2 2

Section 65-5-6 2

Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101 1

Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291 1

The defendant was indicted of the alleged crime of arson pursuant to (Sections 65-5-1 and 6 ACLA 1949 as duly amended by chapter 141 of the 1957 Session Laws) Count One of such indictment alleging the commission of the act of arson in the first degree and, Count Two alleging the commission of the act with the intent to injure and defraud an insurer. (Tr. pages 3 and 4.)

The defendant was found not guilty of Count One and not guilty of Count Two of such indictment.

The indictment did not charge the defendant with having violated Sec. 65-5-2 designated as arson second degree. The jury, however, found the defendant guilty of arson second degree as defined in Sec. 65-5-2.

ARGUMENT.

IN THE ABSENCE OF THE INDICTMENT SPECIFICALLY PLEADING THE OFFENSE OF ARSON IN THE SECOND DEGREE, THE JURY WAS NOT JUSTIFIED IN MAKING SUCH FINDING.

There was no pleading in the indictment of the charge of arson second degree. (Tr. pages 3 and 4.) The only possible theory that may have inspired the jury to make this independent finding was that the jury could have contemplated that arson second degree was an included offense in arson first degree.

A reading of both sections marks the distinction between arson first degree and arson second degree, thus indicating that in arson second degree, the building or structure to be burned is the type not enumerated in the class of buildings set forth in arson first degree.

Numerous jurisdictions having statutes similar to the one under consideration, furthermore, under Federal rules a defendant may be found guilty of a lesser offense than the one charged provided such is included in the greater offense.

The test has been aptly applied by this Court in the case of *Giles v. United States,* 144 F. 2d 860, where Judge Denman stated as follows:

> "The appellee properly states the rule regarding the character of a lesser offense on which an instruction is warranted, as 'To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.' *House v. State,* 186 Ind. 593, 117 N.E. 647."

If we are to apply this rule to the instant proceeding before the Court, it is quite apparent that arson second degree is not deemed to be deemed an included offense, since arson first degree may be committed without having first committed the lesser offense. For illustration, should the accused maliciously and wilfully have burned some property which in no manner is enumerated in arson first degree, such an act may furnish a basis for prosecution in arson second degree and yet not be included in the provisions set forth in arson second degree.

The *Giles* citation (supra) follows the reasoning of *House v. State* lending approval to the legal reasoning in such case.

In the *House* case, the defendant was charged with kidnapping. The Court below, upon failure to find

the defendant guilty of kidnapping, found him to be guilty of a lesser offense, namely, of assault and battery. In the reversal by the Indiana Supreme Court, the Appellate Court stated as follows:

> "It is admitted by all that section 2147, Burns 1914, which relates to convictions of a lesser degree upon a charge of an offense of a higher degree, where the offense consists of different degrees, does not control the question here presented, and that section 2148, Burns 1914, is controlling. That section provides that:
>
> > 'In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that which he is charged in the indictment or affidavit.'
>
> Appellants were found guilty of assault and battery, which by section 2242, Burns 1914, is defined as:
>
> > 'Whoever, in a rude, insolent or angry manner, unlawfully touches another, is guilty of an assault and battery.'
>
> The Attorney General, in his brief for appellee, admits that the controlling question here is whether the offense of assault and battery is included in a charge of kidnapping. In the case of *Polson v. State* (1893) 137 Ind. 519, 35 N.E. 907, the court, in deciding the question of whether assault and battery with intent to commit the crime of rape was included in the crime of rape, said:
>
> > 'It is true that a misdemeanor may be merged in a felony, but as a general rule one felony is not merged into another; especially is this true where the felonies are of the same grade. The crime of assault and battery with intent to com-

mit rape, and the crime of rape, are both felonies belonging to the same class. It is impossible to conceive of rape without an assault and battery for that purpose. The crime of rape necessarily includes an assault and battery with intent to commit a rape.'

In the case of *Ross v. State* (1870) 33 Ind. 167, an attempt was made to sustain a conviction for assault and battery under an information which charged the rescue of a prisoner, upon the theory of the one being necessarily included in the other, as provided by statute. The court held that an assault and battery was not necessarily included in the rescue of a prisoner.

It would seem from these authorities that, to be necessarily included in the greater offense, the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser. This being true, the court is compelled to hold that, if a party is charged with a given crime, he cannot be convicted of another crime of lesser magnitude under the provisions of section 2148, supra, unless a conviction of the crime charged necessitates proof of all the essential elements of the lesser offense, together with the added element which makes the difference in the two offenses. It cannot be said that it is impossible to make full proof of a charge of kidnapping without proving a rude, insolent or angry touching of the person."

The case of *State v. Franklin,* 79 S.E. 2d 692, following the ruling of the *Giles* case, reiterates this philosophy emphatically. (Tr. p. 702.)

"The case at bar involves a principal who, under the evidence, if he acted at all in a criminal way, aided and abetted the principal perpetrator of the crime. Under the evidence in this case, the jury should have found the defendant guilty of rape as principal in the second degree or not guilty. In order for an attempt or any other lesser crime to be included in the greater crime, the lesser crime must 'be such that it is impossible to commit the greater without first having committed the lesser.' *Giles v. United States,* 9 Cir. 144 F.2d 860, 861; *United States v. Barbeau,* D.C 92 F. Supp. 196; *Barbeau v. United States,* 9 Cir. 193 F.2d 945."

Had the prosecution alleged arson second degree on an independent and distinct count in the indictment, affording the defendant an opportunity to meet such issue, the jury on such basis, if such plea were fully sustained by the prosecution, would be fully justified in making such finding.

The appellant rests the entire case on the sole argument deeming same sufficient to merit a reversal, particularly when a verdict of not guilty has been found in both of the counts included in the indictment.

Dated, June 29, 1959.

Warren A. Taylor,
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No. 16,231

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIVIDAD SALINAS, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	

Appeal from the District Court for the District of Alaska, Second Division.

BRIEF FOR APPELLEE.

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FILED
AUG 26 1959
PAUL P. O'BRIEN, CLERK

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I.

It was proper for the jury to bring in a conviction of arson in the second degree although the charge was arson in the first degree as the Alaskan statutes concerned provide that a jury may convict a defendant of a lesser degree of the crime charged in the indictment in all cases where a crime consists of two or more degrees providing the evidence warrants such a finding 7

II.

Not only can the conviction be justified because it is a lesser degree of the same crime charged in the indictment, but it can also be justified as it is a lesser offense necessarily included in the offense charged in the indictment 10

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SUMMARY OF ARGUMENT.

1. It was proper for the jury to bring a verdict of guilty of the crime of Arson in the Second Degree although the charge was Arson in the First Degree.

    (a) The arson law as amended describes a crime specifically consisting of definite superior and inferior degrees.

    (b) The Alaskan code relating to criminal procedure specifically provides that where a crime consists of degrees the jury may find the defendant guilty of any degree inferior to the crime charged in the indictment.

2. It was proper for the jury to bring in a verdict of guilty of the crime of Arson in the Second Degree as that charge fell within the definition of a crime necessarily included in that which was charged in the indictment.

3. Conclusion.

No. 16,231

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIVIDAD SALINAS, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	}

Appeal from the District Court for the District of Alaska, Second Division.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The appellant is not correct in his statement of facts at page 2 of his brief where he alleges that the jury was inspired to make an independent finding that the defendant was guilty of arson in the second degree as an included offense. Appellant was previously advised by the court below in deciding his Motion for Judgment of Acquittal notwithstanding the verdict that "The verdict returned on Count I (Arson in First or Second Degree) was specifically in accordance with the instructions of the Court: they did not superimpose their verdict in any sense." (Tr. p. 45.) The instructions of the court provided for a finding of this

type. (See Instruction 3 A Tr. p. 8 and Instruction 17 Tr. p. 18, the five forms of verdict which define Arson in the First and Second Degree.) They were furnished a verdict to turn in if they made a finding of guilty as to Arson in the Second Degree. The finding was thus fully within the instructions of the court.

At several points in the trial appellee introduced evidence that the building was a dwelling house and appellant's attorney sought to rebut this by cross examination claiming, specifically, that the building had been abandoned as far as use as a dwelling house was concerned. (Tr. pp. 62-66) [government's direct examination], Tr. pp. 115-117 [cross examination by defendant], Tr. 200-223 [government's direct examination], Tr. pp. 226-230 [defendant's cross examination]; Tr. pp. 233-234 [government's redirect]. The government produced two witnesses who stated two different people had occupied the rooms over the grill within the past several months and that a family had lived there the preceding summer and that one of the last residents had gone out to a hospital but had left some personal belongings behind. (See above transcript citations.) This point was fully covered by the trial judge out of the presence of the jury during the trial (Tr. pp. 428-430) while ruling on a motion for judgment of acquittal and motion to elect. He stated that where there was conflicting evidence as to the character of the building he should submit the lesser degree to the jury.

At page 2 of his brief appellant states the charge was based on Section 65-5-1 and 6 ACLA 1949 as duly

amended by chapter 141 of the 1957 Session Laws of Alaska. Since the amended law is very pertinent in considering the matters of degrees of the crime and the aspect of an included lesser offense they are herewith set forth in full as they now appear in Volume 3 of the Cumulative Supplement to Alaska Compiled Laws Annotated 1949.

Sec. 65-5-1. *Arson: First degree: Burning of dwellings.* Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson in the first degree, and upon conviction thereof, be sentenced to imprisonment for not less than two nor more than twenty years. (am L 1957, ch 141, Sec. 1, p 272 app Apr. 1, 1957.)

Sec. 65-5-2. .... *Second degree: Burning of buildings or structures other than dwellings.* Any person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in the preceding section, shall be guilty of arson in the second degree, and upon conviction thereof, be sentenced to imprisonment for nor less than one nor more than ten years or by fine of not more than five thousand dollars or by both such fine and imprisonment. (am L 1957, ch 141, Sec. 2, p 272, app Apr. 1, 1957.)

Sec. 65-5-3. *Arson: Third degree: Burning of other property.* Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any personal property of whatsoever class or character; (such property being of the value of one hundred dollars and the property of another person), shall be guilty of arson in the third degree and upon conviction thereof, be sentenced to imprisonment for not less than one nor more than three years or by fine of not more than three thousand dollars or by both such fine and imprisonment. (am L 1957, ch 141, Sec. 3, p 272, app Apr. 1, 1957.)

Sec. 65-5-5. *Arson: Fourth degree: Attempt to burn building or property.* (a) Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections (Sections 65-5-1-65-5-4 herein), or who commits any act preliminary thereto, or in furtherance thereof shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to imprisonment for not less than one nor more than two years or fined not to exceed one thousand dollars or by both such fine and imprisonment.

(b) The placing or distributing of any flammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections (Sections 65-5-1-65-5-4 herein) in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same shall, for the purposes of this Act (Sections 65-5-1-65-5-6

herein) constitute an attempt to burn such building or property. (am L 1957, ch 141, Sec. 4, p 273, app Apr. 1, 1957.)

Sec. 65-5-6. *Burning to defraud insurer.* Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who aids, counsels or procures the burning of any building, structure or personal property, of whatsoever class or character whether the property of himself or of another, which shall at the time be insured by any person, company or corporation against loss or damage by fire, shall be guilty of a felony and upon conviction thereof, be sentenced to imprisonment for not less than one nor more than five years or by fine of not more than three thousand dollars or by both such fine and imprisonment. (am L 1957, ch 141, Sec. 5, p 273, app Apr. 1, 1957.)

Also, herewith submitted are the laws before the 1957 amendments. Important changes are italicized by the writer.

Sec. 65-5-1. *Arson: Burning dwelling house of another.* That if any person shall willfully and maliciously burn *any dwelling house* of another, or shall wilfully or maliciously set fire to any building owned by himself or another, by the burning whereof any dwelling house of another shall be burned such person shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than ten nor more than twenty years. (CLA 1913, Sec. 1911; CLA 1933, Sec. 4789.)

Sec. 65-5-2. .... *Burning other buildings or boat.* That if any person shall willfully and maliciously burn any church, courthouse, townhouse, meetinghouse, asylum, college, academy, schoolhouse, prison, jail, or other public building erected or used for public uses, or any steamboat, ship, or other vessel, or any banking house, warehouse, express office, storehouse, manufactory, mill, barn, stable, shop, or office of another, or shall willfully and maliciously set fire to any building or boat owned by himself or another, by the burning whereof any edifice, building, boat, or vessel mentioned in this section shall be burned such person shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than five nor more than fifteen years. (CLA 1913, Sec. 1912; CLA 1933, Sec. 4790.)

Sec. 65-5-3. *Burning buildings other than those in Sections 65-5-1, 65-5-2, or bridges, etc.* That if any person shall willfully and maliciously burn any building whatsoever of another other than those specified in sections 65-5-1 and 65-5-2, or shall willfully and maliciously burn any bridge, lock, dam, or flume of another, or erected or used for public uses, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years. (CLA 1913, Sec. 1913; CLA 1933, Sec. 4791.)

Sec. 65-5-7. *"Dwelling house" defined.* That any building is deemed a "dwelling house" within the meaning of the sections of this act defining the crime of arson *any part of which has usually been occupied by any person lodging therein.* (CLA 1913, Sec. 2088; CLA 1933, Sec. 5066.)

It is worthy of note that the previous statute did not break the crime into one of separate degrees specifically. It is also worthy of note that the definition of "dwelling house" did not include the word vacant which is present in the 1957 law under Arson in the First Degree, instead it used the definition of "dwelling house" as a house "any part of which has usually been occupied by any person lodging therein."

I.

IT WAS PROPER FOR THE JURY TO BRING IN A CONVICTION OF ARSON IN THE SECOND DEGREE ALTHOUGH THE CHARGE WAS ARSON IN THE FIRST DEGREE AS THE ALASKAN STATUTES CONCERNED PROVIDE THAT A JURY MAY CONVICT A DEFENDANT OF A LESSER DEGREE OF THE CRIME CHARGED IN THE INDICTMENT IN ALL CASES WHERE A CRIME CONSISTS OF TWO OR MORE DEGREES, PROVIDING THE EVIDENCE WARRANTS SUCH A FINDING.

Appellant suggests that the only theory justifying a conviction of Arson in the Second Degree when the actual charge in the indictment is one of Arson in the First Degree is the provision in the rules of criminal procedure which provides that a defendant may be found guilty of any offense necessarily included in the indictment. (See Federal Rules of Criminal Procedure, Rule 31 c and the Alaskan counterpart Section 66-13-74 ACLA 1949.) Actually there are three rules of procedure that justify such a conviction where the crime is one which consists of degrees of a common offense. Sections 66-13-73 through 75 ACLA 1949. These sections, quoted below, are very specific in this regard.

Sec. 66-13-73. *Conviction of degree inferior to charge or of attempt.* That upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof. (CLA 1913, Sec. 2268; CLA 1933, Sec. 5362.)

Sec. 66-13-74. *Conviction of included crime or attempt.* That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime. (CLA 1913, Sec. 2269; CLA 1933, Sec. 5363.)

Sec. 66-13-75. *Effect of doubt as to degree of crime.* That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. (CLA 1913, Sec. 2252; CLA 1933, Sec. 5342.)

The latter section, 66-13-75 would seem to make it mandatory that the judge include a verdict for Arson in the Second Degree as the defense did attempt to contradict the evidence as to the character of the structure burned, thus creating a situation "that there is reasonable ground of doubt in which of two or more degrees he is guilty." The test set up by the code is whether or not the evidence and the nature of the offense justify a conviction of a lesser degree of the offense charged. Under the Alaskan statute the jury

could have found the defendant guilty of a lesser degree of the offense as well as guilty of an offense necessarily included as will be discussed below.

Some jurisdictions apparently allow a conviction of a lesser offense even when the elements are slightly different. A frequent example of this is the felony murder rule. Under the felony murder rule a homicide is made Murder in the First Degree if committed while in the course of the commission of a felony. Even though the indictment may clearly charge the homicide as part of another felony a verdict of Second Degree Murder (any purposeful murder) is generally allowed. (See *Deaton v. District of Columbia Board of Parole,* 180 F. 2d 396.) This is only true where the evidence warrants such a verdict. This ruling has frequently been made as an interpretation of Rule 31 (c), but it seems likely that under the Alaska Statutes relating to crimes consisting of degrees, the ruling would be even more applicable. *Stephenson v. United States* (162 U.S. 313, 16 S. Ct. 839) is frequently cited by the lower courts as authority for that proposition. The test laid down there is based on the evidence presented.

> "... the defendant charged in the indictment with the crime of murder may be found guilty of a lower grade of crime, viz. manslaughter. *There must, of course, be some evidence which tends to bear on that issue.* The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect."

This opinion is reiterated in *Wallace v. United States* (162 U.S. 475, 16 S. Ct. 839), which also stated:

> Necessarily it must frequently happen that the particular circumstances qualify the character of the offense, and it is thoroughly settled that it is for the jury to determine what effect shall be given to circumstances having that tendency whenever made to appear in the evidence. (p. 475.)

The question as to whether or not a separate crime may be necessarily included relates to the question of whether the proof for the greater crime could be used for the lesser and this should be apparently true in the case of a lesser degree of the same crime as well as necessarily included separate crimes which will be discussed below.

II.

NOT ONLY CAN THE CONVICTION BE JUSTIFIED BECAUSE IT IS A LESSER DEGREE OF THE SAME CRIME CHARGED IN THE INDICTMENT, BUT IT CAN ALSO BE JUSTIFIED AS IT IS A LESSER OFFENSE NECESSARILY INCLUDED IN THE OFFENSE CHARGED IN THE INDICTMENT.

In addition to the statutes allowing a conviction of an inferior degree to that charged in the indictment Rule 31 (c) Federal Rules of Criminal Procedure, cited above, allows a conviction of lesser offense necessarily included in the indictment. The Alaskan counterpart of Rule 31 (c) is Section 66-13-74 ACLA 1949, which although worded slightly different is not substantially different. (See *Barbeau v. United States* below.) Rule 31 (c) provides:

> (c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Two Alaskan cases decided by the 9th Circuit distinguish which type of crimes can be considered lesser offenses necessarily included in the offense charged. The present case can be distinguished from the first of these cited below and is quite similar with the latter cited decision.

The first Alaskan case concerned with the definition of lesser necessarily included offenses is *James v. United States,* 238 F. 2d 681, 9 Cir. 1956, dealing with a conviction on a charge of burglary in a dwelling house. In that case a conviction of burglary in a dwelling was set aside as the proof did not show that the building was usually occupied. The government attempted to justify the conviction as one for burglary not in a dwelling house, a crime covered by a separate section of the code but not denominated as a lesser degree of the same crime by the code. The court rejected this contention for several reasons: (1) the minimum punishment for burglary in a dwelling house actually was less than that for burglary not in a dwelling house and therefore it would be difficult to consider it a lesser offense; (2) burglary not in a dwelling house included an element not included in burglary in a dwelling, namely an allegation that the structure was a place where property is kept; (3) that the crime

did not pass the test set out in *Giles v. United States* (9 Cir. 144 F. 2d 860), namely that it is impossible to commit the greater without committing the lesser offenses.

The instant case passes the above test for the following reasons: (1) the minimum punishment for arson in the second degree is less than that for arson in the first degree (i.e. 2 years for arson in the first degree, one for arson in the second degree); (2) arson in the second degree does not have an additional element to prove but requires less proof as it is merely necessary to prove the burning of "any building of whatsoever class or character", thus a charge of arson in the first degree would include arson in the second degree as it is of course necessary to prove the burning of a building in either case; (3) the statutes (65-5-1 and 2 ACLA Cumulative Supplement) specifically refer to arson in the second degree as a "degree" of the crime of arson. This is not the case in the two burglary statutes; (4) the evidence introduced in this case by both sides actually raised the question of whether or not the building was a dwelling and the government did introduce some proof that it was and the defense took issue with the proof introduced. (See Appellee's statement of facts); (5) The definition of "dwelling house" in the arson case is much broader than in the burglary case as it includes the word "vacant" as well as "occupied" and "unoccupied" thus making it more likely that the proof for one crime could include the proof for the lesser degree; (6) It is necessary to commit the

lesser crime in order to commit the greater (i.e. necessary to set fire to a building in order to burn a dwelling house).

The second case referred to is *United States v. Barbeau* (92 F. Supp. 196 D.C. Alaska 3rd) and *Barbeau v. United States* (193 F. 2d 945 same case 9 Cir. *cert. den.* 343 U.S. 968). In that case the Circuit Court decided that a person indicted for first degree murder could be convicted of negligent homicide even though first degree murder required a deliberate killing and the lesser charge required a negligent or not purposeful killing.

One of the issues involved in this decision was whether or not the indictment put the defendant on notice that he could be convicted of the lesser offense. The court held that he was on notice.

> Since the primary requisite of specificity in the charge—informing the accused—has been met, it is proper to say that negligent homicide is raised in a charge of murder. (p. 948.)

In the *Barbeau* case as well as in the instant case one of the defenses raised was the inferior crime. In *Barbeau* it was claimed that the shooting was negligent because of a defective safety on the gun. In both cases the defense took issue with an allegation of the indictment and was therefore clearly on notice as to the included lesser offense.

Another similar case is *Owens v. United States,* 58 Federal 2d, p. 684 where a conviction of second degree murder was sustained although the charge was mur-

der while committing robbery. (Citing *Wallace v. United States,* 162 U.S. 466 and *Horning v. D.C.,* 254 U.S. 135.) Here the court was impressed because the evidence which was admitted under the charge in the indictment was sufficient proof of the lesser crime.

> The fact that the evidence indicated that appellant was guilty as charged in the second count did not deprive the jury of the power to return a verdict of the lesser offense of murder in the second degree.

Another similar case is *United States v. Lovely,* 77 F. Supp. 619, where it was held that since the crime of rape included an intent to have intercourse by use of force it necessarily included the crime of assault with intent to commit rape and the lesser offense was thus at issue up until the time the element of penetration, which distinguished the two crimes, was admitted. In the instant case the character of the building was the only point at issue distinguishing the two crimes and it remained at issue throughout the trial.

Another case where a verdict of simple assault was allowed when the defendant had been charged with the felony of force likely to produce great bodily injury is *People v. Spreckels,* 270 Pacific 2d 513, App. Calif. 4, where the court said at page 517:

> Under the circumstances presented by the record before us it is apparent that the defendant was not required to guess as to the meaning of the charge and was afforded notice and full opportunity to be heard. It does not appear that he was unable to plan his defense with certainty.

This decision was based on Section 1159 of the Penal Code of California permitting a jury to bring in a finding of guilty on a necessarily included offense.

Another Alaskan Statute also relevant is Section 66-12-9 ACLA 1949 "Conviction or acquittal of a crime consisting of different degrees."

> Sec. 66-12-9. *Conviction or acquittal of crime consisting of different degrees.* That when the defendant shall have been convicted or acquitted upon the indictment for a crime consisting of different degrees, such conviction or acquittal is a bar to another indictment for the crime charged in the former, or for any inferior degree of that crime, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment, as provided in sections 66-13-56 and 66-13-57. (CLA 1913, Sec. 2216; CLA 1933, Sec. 5286.)

This section is an amplification of the "double jeopardy" clause of the constitution. It includes by its terms lesser degrees of the same crime and necessarily included offenses to the crime set forth in the indictment and substantiates the theory set forth herein that conviction of arson in the second degree is justified either as a lesser degree of the crime charged or as a necessarily included offense in the charge set forth.

In view of the above it is submitted that Arson in Second Degree is a necessarily included offense to Arson in the First Degree and that the case falls

within the rule of *James v. United States* and *Barbeau v. United States* cited above.

The *James* case should also be interpreted in view of the *Stephenson* case cited above. The 9th Circuit says it must be impossible to commit the greater crime without committing the lesser, and the Supreme Court was probably saying the same thing when it said the proof of the greater crime must be of such a nature as to show that the lesser crime was committed. It seems clear that if the proof that building was a dwelling house fell short the jury could still find that place burned was a building or other structure because proof of its nature as a dwelling must necessarily refer to its nature as a structure of some sort. For example if, as was claimed, its use as a dwelling had been abandoned, it would still be a building of the sort described in the second degree arson statute.

CONCLUSION.

I. The verdict of the jury finding the defendant guilty of the crime of arson in the second degree is justified by the terms of Section 66-13-73 ACLA 1949 providing that a defendant may be found guilty of lesser degree of the crime charged in the indictment.

II. The conviction of the defendant can also be justified under the theory that the crime for which he was committed is necessarily included in the crime charged in the indictment as the issue was raised by the indictment as to the character of the building burned.

The errors complained of by appellant therefore do not exist and the decision of the court below by sound interpretation of law and by proper consideration of the facts of the case while applying the law. The judgment should be affirmed.

Respectfully submitted,

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No. 16235

IN THE

United States Court of Appeals For the Ninth Circuit

SPOKANE COUNTY,

Appellant,

vs.

AIR BASE HOUSING, INC.,

Appellee.

Appeal from the United States District Court for the Eastern District of Washington.

BRIEF OF APPELLEE

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FILED

APR - 3 1959

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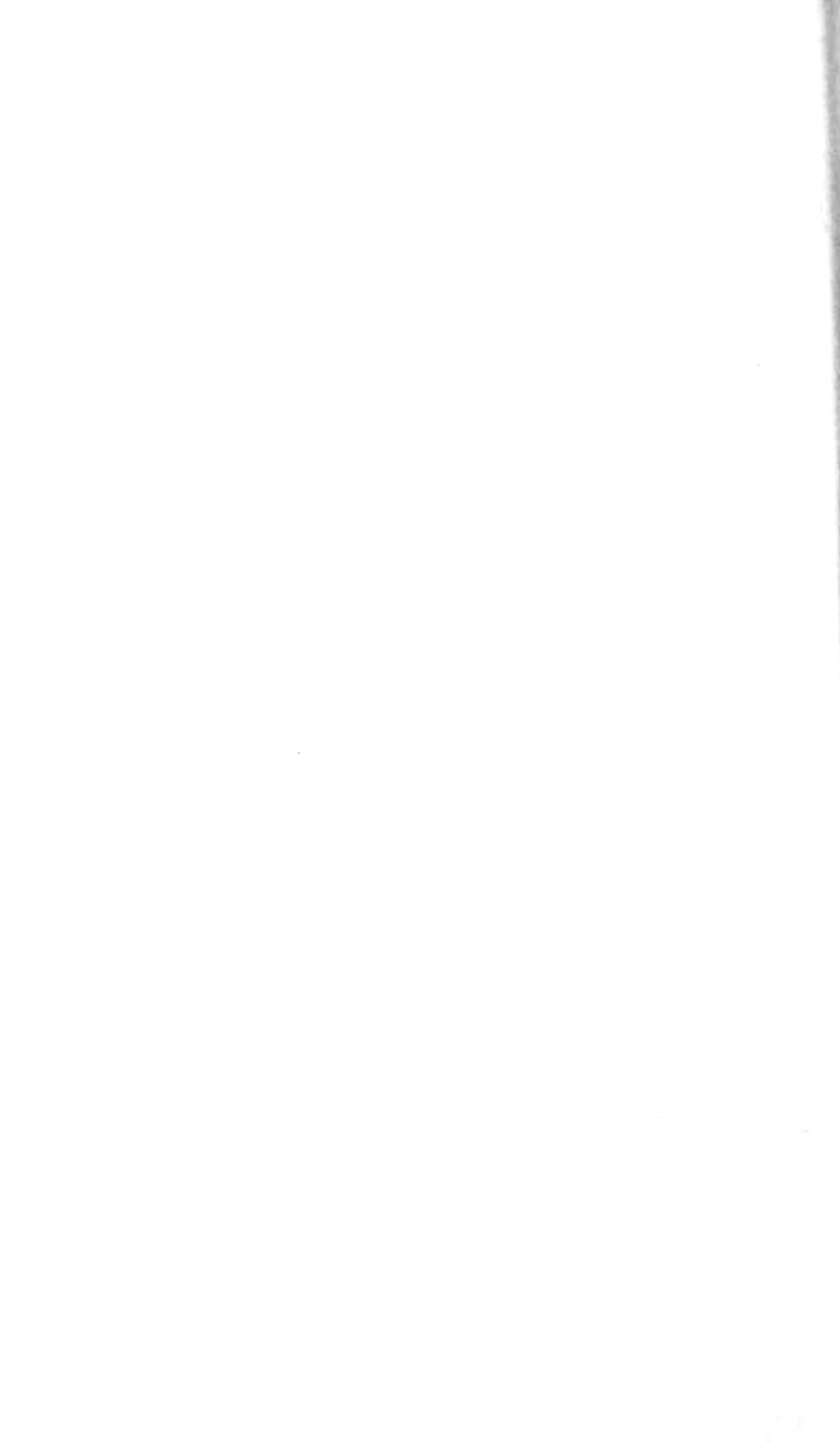


JURISDICTION

This appeal was taken by Spokane County from the district court's final judgment (Tr. 32) on one of multiple claims made by multiple party defendants in a condemnation action commenced by the United States.

The United States, on November 1, 1957, commenced condemnation of, and by declaration of taking (Tr. 3-8) filed on the same date acquired title to, the property described in the complaint and declaration of taking. Jurisdiction of the district court is sustained by 28 U.S.C., Section 1358.

On March 14, 1958 appellant, Spokane County, filed in the district court an "amended personal property tax and assessment lien statement" claiming a lien on the property taken (Tr. 8-9). On June 4, 1958, appellee, Air Base Housing, Inc., filed in the district court a petition for an order rejecting said tax claim and for a partial disbursement of the amount on deposit with the court (Tr. 10-22).

After a hearing held on June 26, 1958, the district court on July 2, 1958 entered findings of fact and conclusions of law which rejected Spokane County's tax claim (Tr. 22-32).

The district court found that multiple parties defendant, Air Base Housing, Inc. and Spokane County, had appeared in the condemnation action making mul-

tiple claims for payment from the deposit and any award which might be made in the action (Tr. 24). And the district court concluded that there was no just reason for delay in the entry of final judgment on the tax claim of Spokane County, and expressly concluded and directed that there should be entered an order of final judgment rejecting said tax claim (Tr. 31).

Accordingly, under Rule 54(b) of the Rules of Civil Procedure, final judgment rejecting the tax claim of Spokane County was entered on July 2, 1958 (Tr. 32-33). Notice of appeal was filed August 6, 1958 (Tr. 34).

Jurisdiction of this Court of Appeals is sustained by 28 U.S.C., Section 1291 and said Rule 54(b).

STATEMENT OF THE CASE

The statement of the case presented by appellant's brief (pages 1-4) is controverted as being incomplete. Hence this statement of the case.

The basic questions in this case involve the application of the provisions of Section 511 of the Housing Act of 1956 (70 Stat. 1110) approved August 6, 1956. Said Section 511 reads as follows:

> "Sec. 511. Section 408 of the Housing Amendments of 1955 is amended by adding at the end thereof the following: 'Nothing contained in the provisions of title VIII of the National Housing

Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: *Provided,* That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property: *And provided further*, That the provisions of this section shall not apply to properties leased pursuant to the provisions of Section 805 of the National Housing Act as amended on or after August 11, 1955, which properties shall be exempt from State or local taxes or assessments.' "

In October 1956 Spokane County levied for taxes payable in 1957; and in October 1957 Spokane County levied for taxes payable in 1958 (Tr. 24-25). Those October 1956 and October 1957 tax levies made by Spokane County on the "Wherry Act Leaseholds" of Air Base Housing, Inc. were held by the district

court to be invalid in their entirety, by reason of determinations made by the designee of the Secretary of Defense pursuant to Section 511 of the Housing Act of 1956 (Tr. 26-27, 31).

The so-called "Wherry Act Leaseholds" of Air Base Housing, Inc. were based upon two leases of 1950 and one lease of 1951, all three leases being between the Secretary of the Air Force, representing the United States, and Air Base Housing, Inc. (Tr. 4-6).

As found by the district court (Tr. 24-25), Spokane County in 1955 and prior years had assessed said "Wherry Act Leaseholds" on a different basis than the assessment basis finally used by Spokane County in 1956 and in 1957 in assessing said leaseholds for taxes payable in 1957 and 1958, respectively. In 1956 Spokane County initially assessed said leaseholds upon the basis used in 1955 and prior years; but after the decision of the Supreme Court of the United States in *Offutt Housing Company vs. County of Sarpy,* 351 U.S. 253, on May 28, 1956 and before equalization of 1956 assessments, Spokane County amended its assessment of said "Wherry Act Leaseholds" to an assessment of the leaseholds based upon the full value of the buildings and improvements covered by said "Wherry Act" leases, a basis of valuation which had been upheld in said Offutt case, involving "Wherry Act Leaseholds" in the State of Nebraska (Tr. 24-25). Subsequent to said amended

assessment, and in October 1956 as required by Section 84.52.030 of the Revised Code of Washington, the Spokane County Commissioners made a tax levy in specific amount on said leaseholds, for personal property taxes payable in 1957 (Tr. 25). Upon the same amended assessment basis, in October 1957 the Spokane County Commissioners made a tax levy in specific amount on said leaseholds, for personal property taxes payable in 1958 (Tr. 25).

The basis of taxation upheld in the Offutt case, *supra,* was subsequently upheld by the Supreme Court of the State of Washington in *Moses Lake Homes, Inc. v. Grant County,* 51 Wn. 2d 285, 317 P. 2d 1069 (1957), as set forth in the statement of the case in appellant's brief (page 2). However, it should be noted that said state court decision involved an action to enjoin the levy of taxes for the year 1955 and thereafter, and that in said case there was not presented to the state courts any question involving application of Section 511 of the Housing Act of 1956, approved August 7, 1956. In that case the Supreme Court of the State of Washington did not give any consideration whatever to Section 511 of the Housing Act of 1956.

Legislation, which became the Housing Act of 1956, was pending in Congress when said Offutt case was decided on May 28, 1956; and the Congress gave consideration to the effect of that case in formulating new statutory provisions respecting taxation of

"Wherry Act Leaseholds" (Tr. 25). Said Offutt case was mentioned by the House Committee on Banking and Currency in House Report No. 2363, June 15, 1956 [to accompany H.R. 11742], in the section of that report entitled "Taxation of Wherry Act Leaseholds" justifying and explaining the provisions of Section 603 of H.R. 11742, which with some modifications became Section 511 of the Housing Act of 1956, approved August 7, 1956 (Tr. 25).

The October 1956 personal property tax levy made by Spokane County on the "Wherry Act Leaseholds" of Air Base Housing, Inc. (for taxes payable in 1957) totaled $83,796.19, of which $39,751.85 was paid under protest in April 1957 to Spokane County by Air Base Housing, Inc. (Tr. 25-26). The balance, together with interest amounting to $182.23 on November 1, 1957, was claimed by Spokane County in this condemnation action to be a lien which had been transferred to and was payable from the deposit and any award which might be made in this condemnation action (Tr. 26). The October 1957 personal property tax levy made by Spokane County on the "Wherry Act Leaseholds" of Air Base Housing, Inc. (for taxes payable in 1958) totaled $90,894.22, which amount likewise was claimed by Spokane County in this action to be a lien which had been transferred to and was payable from the deposit and any award which might be made in this condemnation action (Tr. 26).

On April 29, 1958 George S. Robinson, Deputy Special Assistant for Installations, Department of the Air Force, made "Determination Under Section 408 of the Housing Amendments, as amended: Fairchild Air Force Base, Washington (FHA Projects 171-8002, 3 and 4)" (Tr. 15-17). In the district court counsel stipulated (Tr. 26) that said determination dated April 29, 1958 was made by the duly designated designee of the Secretary of Defense.

As the district court found (Tr. 27) said determination's "Statement of Payments made by Federal Government and Expenditures by Federal Government or Lessee for the Wherry Housing Project, Fairchild Air Force Base, Washington, FHA Projects, Nos. 171-8002, 3 and 4" totaled $109,025.68 for 1956, compared to the tax levy of $83,796.19 made on said "Wherry Act Leaseholds" by Spokane County in October of 1956; and said determination's "Statement of Payments * * *" totaled $113,018.45 for 1957, compared to said tax levy of $90,894.22 made on said "Wherry Act Leaseholds" by Spokane County in October of 1957.

On May 8, 1958, the designee of the Secretary of Defense filed with the County Treasurer of Spokane County said determinations of the deductions to be made from the taxes for the years 1957 and 1958 under the provisions of Section 511 of the Housing Act of 1956; and soon thereafter on June 4, 1958 Air Base Housing, Inc. filed in the district court con-

demnation action its petition for order rejecting tax claim of Spokane County and for partial disbursement of deposit (Tr. 10-22).

The aforesaid tax claim of Spokane County and the aforesaid petition of Air Base Housing, Inc. came on before the district court for hearing on June 26, 1958 (Tr. 22).

Neither by any pleading, nor by any contention made at the hearing, did Spokane County make any claim that the determinations made by the designee of the Secretary of Defense were arbitrary or capricious. And, the district court found (Tr. 27): "There has been no showing that said Determinations by said designee of the Secretary of Defense are arbitrary or capricious."

There followed the district court's findings of fact (Tr. 22-28), conclusions of law (Tr. 28-32) and the district court's "Final Judgment Rejecting the Tax Claim of Spokane County" (Tr. 32-33) from which Spokane County took this appeal.

SUMMARY OF ARGUMENT

With respect to appellant's three specifications of error (Br. 4-5):

I.

Appellant has abandoned (Br. 5) its first specification of error (Br. 4) which was directed at conclusion of law No. I. Accordingly, the district court's conclusions of law I, II, III and IV (Tr. 29) all stand unquestioned on this appeal.

II.

> "Under the Constitution of the State of Washington, as interpreted by the Supreme Court of the State of Washington, the 1956 personal property tax levy made by Spokane County on the 'Wherry Act Leaseholds' of Air Base Housing, Inc., could not have become a valid or effective lien for a tax until the tax levy was made by the County Commissioners in October, 1956; and, therefore, said 1956 levy did not encumber said 'Wherry Act Leaseholds' prior to June 15, 1956, the effective date of the first proviso in Section 511 of the Housing Act of 1956."

The above quoted conclusion of law No. VII (Tr. 30) was correctly made by the district court; and argument by appellant (Br. 5-21) in support of its second specification of error is untenable in view of the controlling, *en banc* decision of the Supreme Court of Washington in *Puget Sound Power & Light Co. v. Cowlitz County,* 38 Wn. 2d 907, 234 P. 2d 506 (1951).

III.

Appellant's third specification of error: "The court erred in entering Conclusion of Law No. V (Tr. 30) that there could be no judicial review of the determinations made by the Secretary of Defense" (Br. 5) has been abandoned by Appellant's Brief (p. 21) wherein appellant states: "A judicial review of the determinations of the Secretary of Defense is not sought." Accordingly, the district court's conclusion of law No. V, as well as conclusion of law No. VI, now stands unquestioned on this appeal.

In any event, neither the Secretary of Defense nor his designee is a party to this suit, and the determinations made under Section 511 of the Housing Act of 1956 by the Secretary of Defense or his designee cannot be attacked collaterally in this action.

In any event, appellant's right of judicial review, if any, was under the Administrative Procedure Act, 5 U.S.C., Section 1001, et seq., in an action in the District of Columbia where the courts have jurisdiction and venue over the Secretary of Defense and his designee.

In any event, there is no merit to the question raised in appellant's brief (pages 21-23)—without specification of error—concerning "the interpretation of the meaning of Section 511."

ARGUMENT

Introduction

At the outset it should be noted that there is no question of fact involved in this appeal. The facts are as found by the district court (Tr. 22-28). Appellant Spokane County has not specified any error in the findings of fact which were consented to by Spokane County's attorney (Tr. 28).

Appellant made three specifications of error (Br. 4-5), directed against the district court's conclusions of law No. I (Tr. 29), Nos. VII and VIII (Tr. 30-31) and No. V (Tr. 30), respectively. Specification of error No. I definitely has been abandoned; and specification of error No. III appears to have been abandoned.

The three parts of the following argument are responsive to the three divisions of appellant's argument (Br. 5-23).

I.

"Congress had constitutional power to enact Section 511 of the Housing Act of 1956, and thereby to permit state and local taxation of 'Wherry Act Leaseholds' subject to the conditions provided in Section 511."

The above subheading is a quotation of the district court's conclusion of law No. III (Tr. 29). It was predicated, in part, on conclusion of law No. I (Tr. 29) to which appellant's specification of error No. I (Br. 4) was directed.

Appellant has abandoned that specification of error in view of cited decisions of the Supreme Court of the United States (Br. 5).

Accordingly, it is now clear that conclusions of law Nos. I, II, III and IV (Tr. 29) all stand unquestioned on this appeal.

It follows, without citation of authority being necessary, that the provisions of Section 511 of the Housing Act of 1956 (page 2, this brief) are supreme law of the land, and that state and local taxation of "Wherry Act Leaseholds" can be valid only if in compliance and conformance with the conditions provided in said Section 511.

II.

"Under the Constitution of the State of Washington, as interpreted by the Supreme Court of the State of Washington, the 1956 personal property tax levy made by Spokane County on the 'Wherry Act Leaseholds' of Air Base Housing, Inc., could not have become a valid or effective lien for a tax until the tax levy was made by the county Commissioners in October, 1956; and, therefore, said 1956 levy did not encumber said 'Wherry Act Leaseholds' prior to June 15, 1956, the effective date of the first proviso in Section 511 of the Housing Act of 1956."

The above subheading is a quotation of the district court's conclusion of law No. VII (Tr. 30). To that conclusion and conclusion of law No. VIII (Tr. 31), appellant's specification of error No. II (Br. 5) is directed.

Appellant's argument in support of its second specification of error (Br. 5-21), in part and in effect, asks this court to disregard the *en banc* decision of the Washington Supreme Court in *Puget Sound Power & Light Co. v. Cowlitz County,* 38 Wn. 2d 907, 234 P. 2d 506 (1951).

In that case, personal properties of the company were in its private ownership on the statutory assessment valuation date of January 1, 1948. Between May and September 1948 the company's privately owned utility properties in each of five counties were sold, respectively, to the five Public Utility Districts (municipal corporations) located in said counties. Later, in October 1948 each of the counties made tax levies in specific amounts on the 1948 assessment valuations of said properties, as taxable to the private company, for taxes payable in 1949. In 1949 the private company, under protest, paid the taxes to the five counties and brought an action against the five counties to recover back the taxes paid under protest. The private company contended that the properties became tax exempt under the state constitution when the properties passed into ownership of the municipal corporations, the public utility dis-

tricts, and that personal property taxes could not become valid, enforceable tax liens on the properties until the tax levies were made in October 1948—after the properties had passed into public ownership.

The counties, through the State Attorney General, relied upon two earlier decisions of the state supreme court holding that personal property tax liens related back to the assessment valuation date. The private company contended that the rule of another earlier decision of the state supreme court involving real property, *State v. Snohomish County,* 71 Wash. 320, 128 Pac. 667 (1912), should be applied to personal property, and recovery of the taxes allowed.

The county court sustained a demurrer to the private company's complaint. On appeal the state supreme court, by a seven to two decision, reversed the county court, applied to the personal property the rule of the Snohomish County case, *supra;* and overruled the two earlier cases relied upon by the attorney general and the county court.

The opinion in the earlier Snohomish case, *supra,* was quoted extensively in the 1951 opinion of the court in the Cowlitz case, with italics supplied by the court. Part of the quotation, pertinent here, reads as follows (38 Wn. 2d 907, 912, 234 P. 2d 506, 509):

> "'The process of taxation is initiated on that day by the assessor then beginning the valuation of all property in the county, fixing the valuation

of each property as of that date. The work of valuation necessarily covers a considerable period of time. As the next step in process, the board of equalization, meeting in August, revises the assessment as made by the assessor. Thereafter, in September, and as another step in the process, the corporate authorities of the cities, towns, and school districts estimate the amount of revenue needed for their respective uses; *and finally, as the last step in the process of taxation, the board of county commissioners* and other taxing authorities *in October levy the tax in specific sums. Then for the first time the concept of a tax is fully realized.* The fact that the lien of the tax so created is by relation attached to specific property as of the date of the initiation of the process on March 1, cannot do away with the necessity of pursuing the whole statutory proceeding before any tax is created so as to attach as a lien as of that or any date. While the state has power for the purposes of the lien to treat the entire proceeding as having been taken at any given time, that fact does not do away with the necessity of any step in the proceeding. *It seems self-evident that there can be no valid or effective lien for a tax until there is a valid tax in some specific amount.*

'Obviously the doctrine of relation pre-supposes a valid creation. It seems equally plain that the creation of a valid tax implies the existence of a susceptible subject of taxation at every stage of the process of such creation. Since, on general principles of public policy and by both constitutional declaration and statutory enactment, lands while held in public ownership are exempt from taxation, the land here in question was not, during any step in the proceedings creating the tax, *after August 9, 1907, when it passed to the state, a susceptible subject of taxation. It fol-*

lows that, at that time, the developing process of imposing the tax as a valid creation was arrested.'" (Italics the Court's.)

In the Cowlitz County case, the rule of the early Snohomish County case was applied to personal property, and the court stated its holding as follows (38 Wn. 2d 907, 916, 234 P. 2d 506, 511):

> "[3, 4] We hold that the exemption from taxation granted in the fourteenth amendment to the state constitution applies with equal force to both real and personal property acquired by a municipal corporation, and that, since there can be no valid tax until there has been a levy specifying the amount thereof (51 Am. Jur. 621, Taxation, Sec. 656), and since title to the operating properties involved in this case passed to the several municipal corporations prior to the date of the levy, these properties were not subject to 1949 taxes."

The Cowlitz County case, *supra,* is the law of the State of Washington.

Appellant attempts to avoid the controlling effect of the Cowlitz County case (Br. 11-21); but as shown in the following paragraphs appellant's argument is inaccurate and unsound.

A federal tax immunity (entire or partial) provided by Congress for a federal instrumentality has standing at least equal to a tax exemption provided by the Washington State Constitution for municipal corporations.

In 1952 the United States Supreme Court, in *Carson v. Roane-Anderson Co.,* 342 U.S. 225, 96 L. Ed. 252, 72 S. Ct. 360, held that certain challenged sales taxes and use taxes imposed by Tennessee, although not forbidden by the Federal Constitution were prohibited by the Atomic Energy Act of 1946. And, the opinion for the unanimous court of eight justices participating stated (342 U.S. 225, 234-235):

> "The constitutional power of Congress to protect any of its agencies from state taxation (Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 84 L. Ed. 11, 60 S. Ct. 15, 124 ALR 1263; Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 86 L. Ed. 65, 62 S. Ct. 1) has long been recognized as applying to those with whom it has made authorized contracts. See Thomson v. Union Pacific R. Co., (U.S.) 9 Wall 579, 588, 589, 19 L. Ed. 792, 797, 798; James v. Drago Contracting Co., 302 U.S. 134, 160, 161, 82 L. Ed. 155, 172, 173, 58 S. Ct. 208, 114 ALR 318. *Certainly the policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the government.* The power stems from the power to preserve and protect functions validly authorized (Pittman v. Home Owoners' Loan Corp., Supra, 308 U. S. p. 33, 84 L. Ed. 16, 60 S. Ct. 15, 124 ALR 1263)—the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress. U.S. Const. Art. 1, Sec. 8, cl. 18." (Italics added.)

When, notwithstanding the Atomic Energy Act of 1946 and the Carson case, *supra,* the Washington Supreme Court, by its six to three decision in *General*

Electric Co. v. State, 42 Wn. 2d 411, 256 P. 2d 265 (1953), upheld business and occupation taxes on General Electric, a private corporation and independent contractor—the state court's judgment was reversed by the United States Supreme Court by per curiam decision, citing the Carson case, *supra, General Electric Co. v. Washington,* 347 U.S. 909, 98 L. Ed. 1066, 74 S. Ct. 474 (1954).

In view of the ultimate outcome in the General Electric case, *supra,* the dissenting opinion of Judge Donworth of the State Supreme Court is significant, 42 Wn. 2d 411, 431, 256 P. 2d 265, 277, wherein he quoted and relied upon the supremacy clause of Article VI of the United States Constitution.

Especially in view of the General Electric case, *supra,* it is clear that in *Moses Lake Homes v. Grant County,* 51 Wn. 2d 285, 317 P. 2d 1069 (1957), the Washington Supreme Court recognized that the manner and extent of state and local taxation of "Wherry Act" leaseholds is controlled by federal legislation, since the Congress had the constitutional power to grant entire tax immunity to those leaseholds held by private corporations or to fix "the extent of the Federal Government's waiver of immunity of Federal projects from state and local taxation * * *."

The Congressional amendment of the "Wherry Act," by Section 511 of the Housing Act of 1956, had the same operative and interruptive effect upon the

Washington state taxing processes as the conveyances of privately owned properties to tax exempt public utility districts had in the case of *Puget Sound Power & Light Co. v. Cowlitz County, supra.*

Moreover, analysis of the situation of Air Base Housing, Inc. shows that that private corporation was in a stronger situation than was Puget Sound Power & Light Co. in the Cowlitz case, *supra.*

As shown by the General Electric and Moses Lake Homes cases, *supra,* even though Air Base Housing, Inc. was a private corporation operating under a lease of the Government owned housing project, tax immunity of the leaseholds and the extent of waiver of tax immunity of the leaseholds were matters within the control of the Federal Government.

Puget Sound Power & Light Co. was not a governmental instrumentality and its personal property on the assessment date in 1948 did not have even a tinge of tax immunity. Yet, because tax immunity developed upon the purchases of the property by the municipal corporations before the October 1948 tax levies in specific amounts, the private corporation was entitled to recover back the personal property taxes paid under protest.

In the case of Air Base Housing, Inc., the "Wherry Act" leaseholds were subject to taxation only to "the extent of the Federal government's waiver of immunity of Federal projects from state and local tax-

ation"—at the time of the assessments made in 1956, and also in prior years. In 1955 and earlier years, *and when Spokane County assessed the leaseholds early in 1956 and made an amended assesment on June 12, 1956,* the housing project at Fairchild Air Base was public property owned by the United States, and the leaseholds of that project held by Air Base Housing, Inc. could be taxed only in the manner and to the extent tax immunity was waived by Congress in the "Wherry Act."

The manner and extent of the Federal Government's waiver of tax immunity was changed by Act of Congress on August 7, 1956, before the 1956 taxing processes were completed by the October 1956 tax levy in specific amount. And, upon the authority of the Cowlitz County case and other cited cases, *supra,* Section 511 of the Housing Act of 1956 had an interruptive effect upon the taxing processes, of a standing at least equal to that of the sale of privately owned properties to municipal corporations, involved in the Cowlitz case, *supra.*

Moreover, it should be noted that the Washington State Constitution recognizes the controlling effect of Federal legislation on state and local taxation of Federal instrumentalities. The 19th Amendment of the Washington State Constitution provides as follows:

> "The United States and its agencies and instrumentalities, and their property, may be taxed under any of the tax laws of this state, whenever and in such manner as such taxation may be authorized or permitted under the laws of the United States, notwithstanding anything to the contrary in the Constitution of this state. [1945 p. 932, House Joint Resolution No. 9. Approved November, 1946.]"

It follows that under the Washington Constitution, Section 511 of the Housing Act of 1956, approved August 7, 1956, controlled taxation of the leaseholds of Air Base Housing, Inc. before the October 1956 levy, the last step in the 1956 taxing processes, and therefore before there could be a valid or effective tax lien on the leaseholds.

Only brief comment need be made on cases cited and discussed in part II of appellant's brief (Br. 5-21).

United States v. Alberts, 55 F. Supp. 217 (1944)—(Br. 7)—involved taxes for 1944, levied in October 1943; and ownership of the two tracts involved passed to the United States in November 1943 and February 1944—after the October 1943 levy. The case did not, therefore, involve the type of situation presented in the Cowlitz County case, *supra,* or in this appeal.

Klickitat Warehouse Co. v. Klickitat County, 42 Wash. 299, 84 Pac. 860 (1906)—(Br. 8)—did not involve any change in taxability or extent of taxability between assessment date and levy date.

Puyallup v. Lakin, 45 Wash. 368, 88 Pac. 578 (1907)—(Br. 8)—was expressly overruled by the Cowlitz County case, 38 Wn. 2d 907, 914, 234 P. 2d 506, 510 (1951).

Neither *Dingle v. Camp,* 121 Wash. 393, 209 Pac. 853 (1922) nor *Ernst v. Guarantee Millwork, Inc.,* 200 Wash. 195, 93 P. 2d 404 (1939)—(Br. 9)—involved any change in taxability or extent of taxability between assessment date and levy date.

The 1921 case of *Puget Sound Power & Light Co. v. Seattle,* 117 Wash. 351, 201 Pac. 449—(Br. 9)—was expressly overruled by the 1951 Cowlitz County case, 38 Wn. 2d 907, 916, 234 P. 2d 506, 511, insofar as the 1921 case was inconsistent with the 1951 opinion.

As stated by appellant (Br. 9), *State v. Snohomish County,* 71 Wash. 320, 128 Pac. 667 (1912) decided "that a levy was necessary to establish the lien on real property"—and in the 1951 Cowlitz County case, *supra,* the court applied the Snohomish County case real property rule to personal property and decided that a levy was necessary to establish the lien on personal property. With respect to what was said by the court in the earlier Snohomish County case, relating to personal property taxes, the court in the 1951 Cowlitz County case said it "was pure *dictum,* there being no such taxes involved, and is to be disregarded as authority in this case." 38 Wn. 2d 907, 914, 234 P. 2d 506, 510.

Public Utility District No. 1 of Lewis County v. Pierce County, 24 Wn. 2d 563, 166 P. 2d 933 (1946) —(Br. 10)—was decided before the 1951 Cowlitz County case, *supra;* and that 1946 decision is not inconsistent with the 1951 decision.

State ex rel. Peoples National Bank of Washington v. King County, 36 Wn. 2d 10, 216 P. 2d 225 (1959) did not involve any change in taxability or extent of taxability between assessment date and levy date, but merely a matter of priorities.

With reference to the 1951 Cowlitz County case, *supra,* appellant states (Br. 12): "It is to be noted that the court did not say there could be no lien until the levy was made." That notation is inaccurate. In the Cowlitz case, the court (adding its own italics) quoted with approval and applied to personal property the following language from the earlier Snohomish County case (38 Wn. 2d 907, 912, 234 P. 2d 506, 509):

> *"It seems self evident that there can be no valid or effective lien for a tax until there is a valid tax in some specific amount."*

That statement, emphasized by the court in the Cowlitz County case, is an essential part of the opinion and decision in that case.

In *Anderson v. Grays Harbor County,* 49 Wn. 2d 89, 297 P. 2d 1114 (1956)—(Br. 12)—the court did state that "a lien is an encumbrance upon property

as security for the payment of a debt." But that case, irrelevant to appellant's second specification of error, held, under a special statute providing for a "yield tax" on certain classes of forest lands, that the "yield tax" which covered logging operations in 1948, 1949 and 1950 "did not become a lien against the land until after the company, on September 18, 1953, filed a cutting report covering its operations covering those years."

The cases cited on pages 13-15 of appellant's brief, involving California, Missouri, New Hampshire and Alabama taxes are irrelevant to this appeal, for what is involved in appellant's specification of error No. II is the law of the State of Washington.

The memorandum decision of the county court, in case No. 152332 in the Superior Court of the State of Washington in and for the County of Spokane, quoted in appellant's brief (Br. 16-21) is, as stated by appellant, on appeal to the Washington Supreme Court. It is respectfully submitted that this Court of Appeals should not give any weight to that county court decision.

The *enbanc* decision of the Supreme Court of the State of Washington in the Cowlitz County case, *supra,* and the authorities and argument in this part of appellee's brief all show that there was no error in the district court's conclusions of law Nos. VII and VIII (Tr. 30-31).

And, it should be noted that in tax cases the Washington Supreme Court follows the rule of strict construction in favor of the taxpayer. That court stated in *Buffelen Lbr. & Mfg. Co. v. State*, 32 Wn. 2d 40, 43, 200 P. 2d 509, 511 (1948):

> "It must be borne in mind that, if there is any doubt as to the meaning of a taxing statute, it must be construed most strongly against the taxing power in favor of the citizen."

And, that statutory rule of strict construction in tax cases, in favor of the taxpayer, was referred to and applied by the Washington court, sitting *en banc*, as recently as February 26, 1959, *In the Matter of the Estate of Della E. Ehler*, 153 Wash. Dec. 622, 624, ... P. 2d ....

III.

Appellant has abandoned Specification of Error No. III. In any event, determinations made by the Secretary of Defense cannot be reviewed in this action. In any event, there is no merit to the question raised in appellant's brief.

In the first paragraph under part III of appellant's argument (Br. 21), appellant states: "A judicial review of the determinations of the Secretary of Defense is not sought." That statement, it is submitted, amounts to abandonment of appellant's specification of error No. III (Br. 5) which reads: "The court erred in entering Conclusion of Law No. V (Tr. 30) that there could be no judicial review of the determinations made by the Secretary of Defense."

It should be noted that appellant's specification of error No. III does not accurately describe the first part of conclusion of law No. V (Tr. 30) which deals with judicial review, but omits the qualifying clause, "in the absence of arbitrary and capricious action,". It should be noted further that finding of fact No. IX (Tr. 27) reads: "There has been no showing that said Determinations by said designee of the Secretary of Defense are arbitrary or capricious." And, no specification of error has been directed to conclusion of law No. VI (Tr. 30) that "There has been no showing of any arbitrary or capricious action in the determinations made under Section 511 by the designee of the Secretary of Defense for the years 1956 and 1957 * * *."

In view of the apparent abandonment of specification of error No. III, conclusion of law No. V, as well as No. VI, now stands unquestioned on this appeal.

In any event, even if specification of error No. III not be deemed by this court to have been abandoned, the determinations under Section 511 of the Housing Act of 1956 made with respect to the "Wherry Act Leaseholds" of appellee cannot be reviewed in this action or on this appeal.

The transcript of record shows that neither the Secretary of Defense nor his designee is a party to this action. The transcript of record also shows, by

Exhibits A, B and C (Tr. 15-20), certified copies of which were received in evidence (Tr. 26), that the Secretary of Defense and his duly designated designee had their official residence in Washington, D. C.

They and their successors, if any, are indispensable parties to any action to review, modify or reverse any of said Section 511 determinations; they are not parties to the action in which this appeal has been taken; and they are beyond the jurisdiction of the district court from which this appeal has been taken.

As stated by the court in *Mouton v. United States*, D. C., W. D. Wash., 106 F. Supp. 336, 337 (1952):

> "The heads of the Executive Departments of the Government, such as the Postmaster General, Ernest v. Fleissner, D.C., 38 F. Supp. 326, and the Secretaries of the Treasury and of Commerce, U.S. v. Tacoma, etc., S. S. Co., 9 Cir., 86 F. 2d 363, at page 368, and the Secretary of Labor, Grandillo v. Perkins, D.C., 36 F. Supp. 546, and the Secretary of the Interior, Tribal Council of Blackfeet Indian Reservation v. Ickes, D.C., 58 F. Supp. 584, are as a general rule amenable to suit only in the District of Columbia, the District of their official residence. They, except in special circumstances not involved here, are not suable in this Court in the Western District of Washington. See, generally, Butterworth v. Hill, 114 U.S. 128, 5 S. Ct. 796, 29 L. Ed. 119; and 28 U.S.C.A Sec. 1391(b). Upon the same authorities, and for the same reasons, the above named Secretary of the Navy is not suable in this Court.
>
> * * * *

> "The Federal Administrative Procedure Act, supra, does not in any material way prevent the application of the foregoing principles to this case. Blackmar v. Guerre, 342 U.S. 512, 72 S. Ct. 410, 96 L. Ed. ...."

Torres v. McGranery, D. C., S. D. Cal., 111 F. Supp. 241 (1953); *Adcox Schools v. Administrator of Veteran Affairs,* 9 Cir., 217 F. 2d 54 (1954), and *Blackmar v. Guerre,* 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534 (1952), are to the same effect.

Moreover, Spokane County's right to judicial review, if any, of the Section 511 determinations was a right under the Administrative Procedure Act, 5 U.S.C., Sections 1001, et seq. But if said determinations were reviewable under 5 U.S.C., Section 1009, they would be reviewable only in a court of "competent jurisdiction." And, it must be in the district where the Secretary of Defense and his designee could be served. The courts of the District of Columbia are the only courts of "competent jurisdiction" to reach the Secretary of Defense and his designee whose official residences are in the District of Columbia. The Blackmar and Adcox School cases, *supra,* expressly hold to that effect.

Furthermore, Spokane County having failed to exercise its right, if any, to appeal the Section 511 determinations directly—by resort to the Administrative Procedure Act, *supra,*—cannot now attack those determinations collaterally in this action. As

the court stated in *Elbow Lake Coop. Grain Co. v. Commodity Credit Corp.*, D. C. Minn., 144 F. Supp. 54, 61-62 (1956):

> "Where, as here, the action of an agency is of a quasi judicial character, it is well established that the validity of its order cannot be attacked by collateral proceedings. Callanan Road Imp. Co. v. United States, 1953, 345 U.S. 507, 73 S. Ct. 803, 97 L. Ed. 1206; Stanley v. Supervisors of Albany County, 1886, 121 U.S. 535, 550, 7 S. Ct. 1234, 30 L. Ed. 1000; Reconstruction Finance Corp. v. Lightsey, 4 Cir., 185 F. 2d 167. Between the provisions of the Grain Standards Act and the regulations issued thereunder, and the provisions of the Administrative Procedure Act, 5 U.S.C.A., Sec. 1001 et seq., plaintiffs are afforded ample and sufficient opportunity to appeal these findings directly. They cannot now attack them in this collateral proceeding."

And, as the court held in *Reconstruction Finance Corp. v. Lightsey*, 4 Cir., 185 F. 2d 167, 170 (1950):

> "Even were the action of the Housing Expediter reviewable by the District Court, this case must be reversed for another reason. Administrative action is conclusive on review unless such action is not in accordance with law, is unsupported by competent, material, and substantial evidence, or is arbitrary or capricious. Philadelphia Co. v. Securities and Exchange Commission, 85 U.S. App. D.C. 327, 177 F. 2d 720; Montana-Dakota Utilities Co. v. Federal Power Commission, 8 Cir., 169 F. 2d 392, certiorari denied 335 U.S. 853, 69 S. Ct. 82, 93 L. Ed. 401; National Broadcasting Company v. United States, D.C., 47 F. Supp. 940."

Considering this appeal in the light of the criteria of the Lightsey case, *supra*, it should be noted that in this case on appeal the district court found and concluded—without any claim of error—that there was not any arbitrary or capricious action involved in the Section 511 determinations. Nor has there been any claim of lack of competent, material and substantial evidence. — Of said criteria there is left only the question whether "such action is not in accordance with law."

In any event—even if "the interpretation of the meaning of Section 511" (Br. 21), which appellant questions, could be considered on this appeal, without specification of error, in a collateral attack and in the absence of the Secretary of Defense and his designee—appellant's contention would be found to be without merit.

Reference to the United States Supreme Court's recognition of Congressional permission for state taxation of "Wherry Act Leaseholds", and reference to legislative history of the Housing Act of 1956, show that appellant's contention is without merit.

On May 28, 1956 the Supreme Court of the United States decided *Offutt Housing Co. v. Sarpy,* 351 U. S. 253, 100 L. Ed. 1151, 76 S. Ct. 814. The five to four decision affirmed the judgment of the Supreme Court of Nebraska, which had held "that Congress had given Nebraska the right to tax petitioner's

(lessee's) interest in the property (Wherry Military Housing Project) * * *." (351 U. S., at p. 256.)

The majority opinion limited the scope of decision, as regards Nebraska's power to tax the lessee's interest, to the question of Congressional consent.

> "The line of least resistance in analysis of our immediate problem is to ascertain whether Congress has given consent to the type of state taxation here asserted." (351 U. S., at p. 257.)

And after analysis of the applicable statutes, the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949 (adding Title VIII to the National Housing Act), the court stated its decision (351 U. S., at p. 260):

> "We hold only that Congress, in the exercise of this power, has permitted
>
> *[261]
>
> *such state taxation as is involved in the present case."

Legislation, which became the Housing Act of 1956, was pending in Congress when the Supreme Court decided the Offutt case; and the Congress dealt with the problems involved in taxation of "Wherry Act Leaseholds." Mentioning the Offutt case, the House Committee on Banking and Currency stated in House Report No. 2363, June 15, 1956 [to accompany H. R. 11742], (U. S. Code Congressional and Administrative News, 1956, vol. 3, page 4509, 4555):

"TAXATION OF WHERRY ACT LEASEHOLDS

"The bill would clarify congressional intent with respect to the rights of local communities to tax the interests of mortgagors under the Wherry Act mortgage insurance program (title VIII of the National Housing Act prior to the Housing Amendments of 1955) who have leased the mortgaged property from the United States.

* * * *

"Section 603 [which became Section 511] of the bill would expressly provide that nothing contained in title VIII or other law shall be construed to exempt from State or local taxes or assessments any right, title, or other interest of a lessee from the Federal Government with respect to any property covered by a mortgage insured under that title. However, *the section would provide that any such taxes or assessments must be reduced* (from the amount otherwise levied or charged) by such amount as the Federal Housing Commissioner determines to be equal to (1) any payments in lieu of taxes made by the Federal Government to the local taxing bodies with respect to the property plus (2) any expenditures made by the Federal Government for streets, utilities, and other services for or with respect to the property. For purposes of these deductions, initial capital expenditures by the Federal Government for the services referred to could be allocated over such period of years as the Commissioner determined to be appropriate.

* * * *

"The recent decision of the Supreme Court of the United States in the case of Offutt Housing Company v. County of Sarpy (May 28, 1956) upheld the right of local taxing officials in the

State of Nebraska to levy certain State and county 'personal property' taxes against the lessee's interest in a title VIII project, measured by the full value of the buildings and improvements. However, as a large portion of the projects have not been subject to State and local taxes, *payments in lieu of taxes have frequently been made to local taxing officials in exchange for usual services, such as schools, furnished to the projects. Also, many expenditures have been made by the Federal Government for streets, utilities, schools, and other services normally furnished by taxing bodies.* As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, it is important that no payments be made to communities which would constitute a windfall over and above normal taxes. Consequently, it is very important to assure that the project does not duplicate payments for services furnished to it. This duplication would be avoided under the provision in the bill for deductions from tax payments, as explained above." (Italics supplied.)

With minor amendments Section 603 of H. R. 11742, 84th Congress, became Section 511 of the Housing Act of 1956, approved August 7, 1956 (page 2 this brief).

It is obvious that the 84th Congress intended that the Secretary of Defense or his designee, in making Section 511 determinations, should take into account both payments for operation of schools and the cost of constructing an on-base school under P. L. 815, 81st Congress—as the designee of the Secretary of Defense did in this case (Tr. 17).

There is rational and statutory foundation for the Section 511 determinations involved in this case. And, in this case the facts are undisputed.

As the Supreme Court of the United States stated in *Securities and Exchange Com. v. Chenery Corp.*, 332 U. S. 194, 207, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947):

> "The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation."

Accordingly, the conclusion of the designee of the Secretary of Defense should not be disturbed, in the event appellant properly has questioned "the interpretation of the meaning of Section 511" (Br. 21).

However, conclusion of law No. V (Tr. 30) was properly made; and there having been no showing of arbitrary or capricious action, appellant is not entitled to review of the Section 511 determinations made by the designee of the Secretary of Defense.

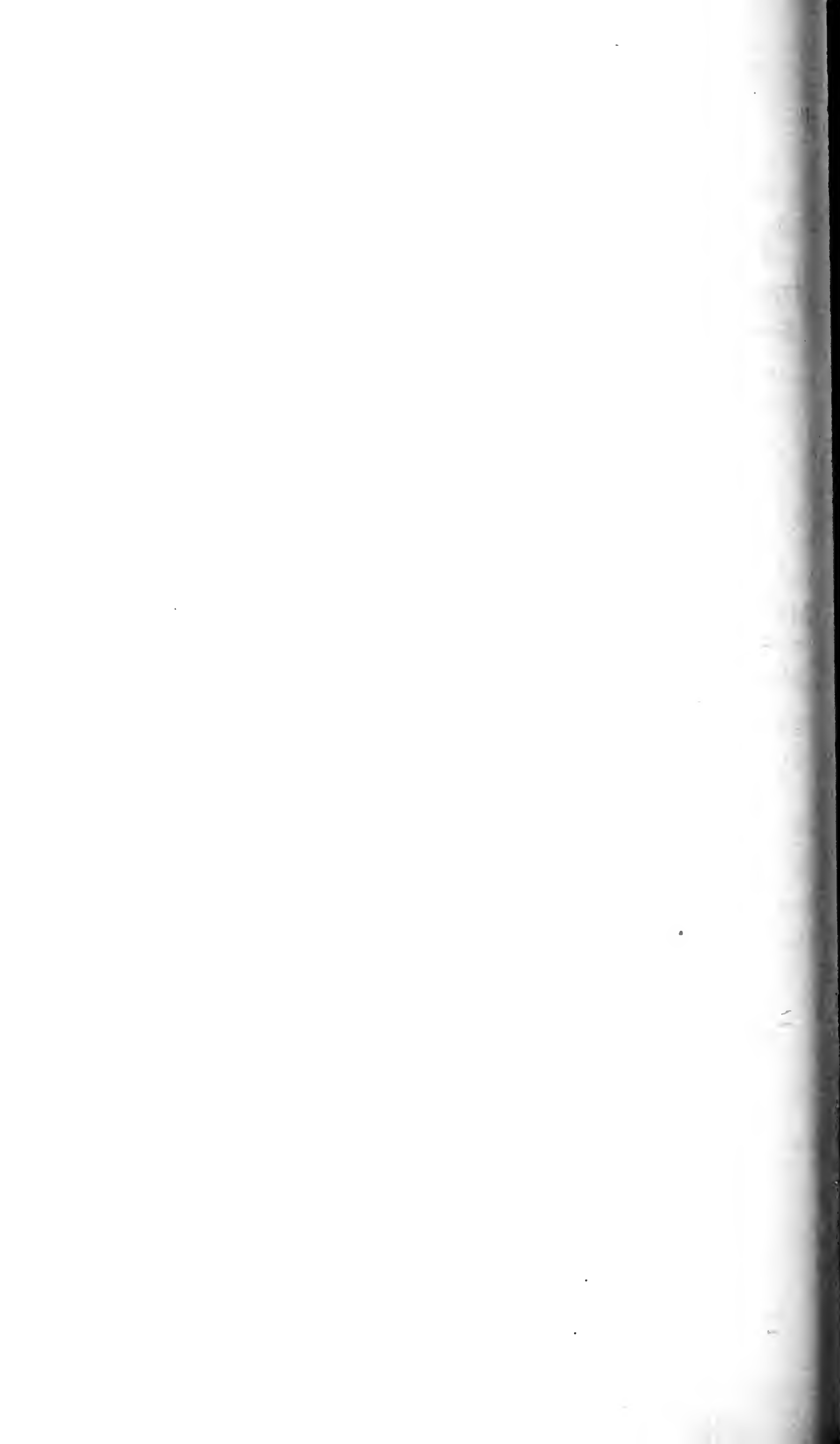
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

J. K. CHEADLE
Spokane, Washington
and
T. DAVID GNAGEY
Spokane, Washington

March 1959



No. 16235

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE COUNTY, *Appellant,*

vs.

AIR BASE HOUSING, INC., AND UNITED STATES OF AMERICA, *Appellees.*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

---

BRIEF FOR THE UNITED STATES

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FILED
APR - 6 1959
AUL P. O'BRIEN, CLERK

SHAW & BORDEN CO. 3-26-1959—60 COPIES 323711

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No. 16235

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE COUNTY, *Appellant,*

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On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings of fact (R. 22-27) conclusions of law (R. 28-32) and oral opinion of the trial court (R. 36-51) are not officially reported.

JURISDICTION

This appeal is taken from a judgment on one of a series of multiple claims asserted in a condemnation

action. The action was originally instituted by the United States of America by the filing, on November 1, 1957, of a complaint and declaration of taking pursuant to which the United States sought to acquire by condemnation certain leasehold interests and easements held by appellee Air Base Housing, Inc. (R. 3-8, 52.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1358. On March 14, 1958, appellant, Spokane County, filed in the District Court an amended personal property tax and assessment lien statement claiming a lien on the property taken. (R. 8-9.) Thereafter on June 4, 1958, appellee Air Base Housing, filed a petition for an order rejecting the appellant's tax claim and for a partial disbursement to it of the amount deposited with the court. (R. 10-15.) After a hearing held on June 26, 1958, the District Court, on July 2, 1958, entered findings of fact and conclusions of law which rejected appellant's tax claim and which contained a finding by the District Court that there was no just reason for delay in entering final judgment on appellant's claim and directed that such final judgment be entered. (R. 22-32.) Final judgment was accordingly entered on July 2, 1958 (R. 32-33), and notice of appeal was filed August 6, 1958 (R. 34). Jurisdiction of this Court rests on 28 U.S.C., Section 1291 and Rule 54(b) of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED

1. Does Congress have power to immunize private persons who deal with the Federal Government from state and local taxation?[1]

2. Did appellant's 1957 taxes become an encumbrance upon the property of appellee Air Base Housing, Inc., prior to June 15, 1956, as required by Section 511 of the Housing Act of 1956?[2]

3. Under Section 511 of the Housing Act of 1956, which permits state and local taxation of lessees from the Federal Government in amounts not exceeding

---

[1] This issue though asserted by appellant in its specifications of error (Br. 4) has been expressly abandoned by appellant (Br. 5) and consequently will not be further discussed herein. As appellant notes, such abandonment is compelled by the decisions of the Supreme Court in *United States v. City of Detroit,* 255 U.S. 466, and *City of Detroit v. Murray Corp.,* 355 U.S. 489.

[2] This issue is one of state law upon which the court below has correctly ruled. The issue by its very nature is narrow, i.e., it relates solely to 1957, and concerns the construction of a state statute. The United States will neither brief the issue nor argue it, deferring to the County and private litigant in this regard. The 1958 taxes, levied in 1957, did not and could not have become an encumbrance upon appellee Air Base Housing, Inc.,'s property interest until after June 15, 1956, the effective date of Section 511.

the taxes on property of similar value and which provides for the deduction from such taxes of any amounts paid by the Federal Government to local taxing or other agencies with respect to such property, are payments by the Federal Government for the operation of local schools properly deductible from the taxes otherwise payable, as the District Court held, or are such payments outside the scope of Section 511, as appellant contends?

STATUTES INVOLVED

These appear in the Appendix, *infra*.

STATEMENT

The findings of the District Court (R. 22-27) may be briefly summarized as follows:

On November 1, 1957, appellee the United States of America commenced an action for the condemnation of land, and, by declaration of taking filed on that date, acquired title to certain leaseholds and easements held by appellee Air Base Housing, Inc., subject to stated mortgages thereon. The sum of $3 was deposited with the court with the declaration of taking and on December 17, 1957, an amendment of the declaration of taking was filed and there was deposited with the court an additional amount of $199,997. Subsequently, pursuant to court order a partial disbursement was made to appellee Air Base

Housing, Inc., in the amount of $24,500; the sum of $175,500 was thus left on deposit with the court. The principal properties taken by the United States consisted of so-called "Wherry Act Leaseholds" held by appellee Air Base Housing, Inc., and which were subject to mortgages insured under the provisions of Title VIII of the National Housing Act in effect prior to August 11, 1955. Such leaseholds involved housing projects located at Fairchild Air Force Base, State of Washington, and were designated by the Air Force as "Wherry Housing Project, Fairchild Air Force Base, Washington, FHA Projects 171-8002, 3 and 4." (R. 23-24.)

Appellant, Spokane County, and appellee Air Base Housing, Inc., appeared in this action and made claims to payment from the amount deposited and from any award which might be entered in the action. Appellant, Spokane County, filed a tax claim on December 17, 1957, in the amount of $135,120.79. On March 14, 1958, it filed an "Amended Personal Property Tax and Assessment Lien Statement" for the same amount. In 1955 and prior years appellant, Spokane County, had assessed "Wherry Act Leaseholds" upon a different basis than that utilized in 1956 and 1957. After the decision of the United States Supreme Court in *Offutt Housing Co. v. Sarpy County,* 351 U.S. 253, on May 28, 1956, appellant Spokane County amended its assessment of such

leaseholds in order that the assessments could be based on the full value of the buildings and improvements covered by the leases. This basis of assessment had been upheld in the *Offutt* case which involved similar leaseholds in the State of Nebraska. In October, 1956, as required by Section 84.52.030 of the Revised Code of Washington, the Spokane County Commissioners made a tax levy upon the leaseholds for personal property taxes payable in 1957. On the same basis the Commissioners made a tax levy in October, 1957, on such leaseholds for personal property taxes payable in 1958. (R. 24-25.) The legislation which became the Housing Act of 1956 was pending in Congress when the *Offutt* case was decided by the Supreme Court, and Congress dealt with the problems involved in the taxation of "Wherry Act Leaseholds." The *Offutt* case was mentioned in H. Rep. No. 2363, 84th Cong., 2d Sess., pp. 48-49 (3 U.S.C. Cong. & Adm. News (1956) 4509, 4555-4556, dated June 15, 1956, in that part of the report which explained the provisions of Section 603 of H. R. 11742, which, with modifications, became Section 511 of the Housing Act of 1956, approved August 7, 1956. (R. 25.)

The October, 1956, personal property tax levy made by appellant, Spokane County, on the leaseholds of appellee Air Base Housing, Inc., for taxes payable in 1957 totalled $83,796.19. Of this amount, $39,751.85 was paid under protest by Air Base Housing, Inc.,

and the balance, together with interest of $182.23, as of November 1, 1957, is claimed by appellant, Spokane County, to be a lien which has been transferred to and is payable from the deposit and any award which may be made in this condemnation action. The October, 1957, personal property tax levy for taxes payable in 1958 totalled $90,894.22. This amount is likewise claimed by appellant, Spokane County, to be a lien which has been transferred to and is payable from the deposit and any award which may be made in this condemnation action. (R. 25-26.)

On April 29, 1958, George S. Robinson, Deputy Special Assistant for Installations, Department of the Air Force, made a determination labeled "Determination Under Section 408 of the Housing Amendments, as amended: Fairchild Air Force Base, Washington (FHA Projects 171-8002, 3 and 4)". A certified copy of this determination was received in evidence at the hearing before the District Court, as were also copies of an order of January 8, 1957, and a directive of November 16, 1956, containing delegations of authority to make such determinations. Counsel stipulated before the District Court that the determination was made by a duly designated designee of the Secretary of Defense. The statement of payments and expenditures made by the Federal Government with respect to the project here involved, attached to such determination, shows a total of $109,-

025.68, for 1956 as compared to the tax levy of appellant, Spokane County, in October, 1956, in the amount of $83,796.19. The statement of payments for the year 1957 shows a total of $113,018.45 as compared to appellant, Spokane County's tax levy in October, 1957, in the amount of $90,894.22. (R. 26-27.) Such statement of payments reads in pertinent part as follows (R. 17):

> Statement of Payments Made by Federal Government and Expenditures by Federal Government or Lessee for the Wherry Housing Project, Fairchild Air Force Base, Washington, FHA Projects, Nos. 171-8002, 3 and 4.

	1956	1957
I. Payments Made by the U.S. Office of Education		
(a) Payments for operation of schools pertaining to dependants living in Wherry Projects pursuant to P. L. 874, 81st Congress	$48,460.80	$52,453.57

The District Court found that there had been no showing that the determination made by the designee of the Secretary of Defense was arbitrary or capricious. It also found that since there was an amount of $175,500 on deposit with the court in the action, and that since the probabilities were that the trial of the issues of just compensation would be protracted, there was no just reason for delay in entering a final judgment on appellant's tax claim. (R. 27.) The Dis-

trict Court, in addition to its oral opinion (R. 36-51), entered conclusions of law. It concluded that the Congress has constitutional power to create entire or partial tax immunities from state or local taxation for private parties who have made contracts with the United States in furtherance of authorized federal programs, and that the leases here in question constituted contracts made pursuant to authorized federal programs for housing of military personnel. The District Court also concluded that Congress had constitutional power to enact Section 511 of the Housing Act of 1956 and to permit state and local taxation of "Wherry Act Leaseholds" subject to the conditions contained in such section; that the provisions of Section 511 are applicable to any "Wherry Act Leasehold" insured under Title VIII of the National Housing Act in effect prior to August 11, 1955, whether or not the United States has exclusive jurisdiction over the land on which the housing project was located (R. 29); that, Congress did not intend that state and local authorities should have a right to judicial review of determinations made by the Secretary of Defense or his designee under Section 511 of the Housing Act of 1956 in the absence of a showing of arbitrary and capricious action; and that Congress intended that acceptance of such determinations be a condition of the permission to tax such leaseholds, as provided in Section 511. (R. 30.)

The District Court concluded that under the Constitution of the State of Washington, as interpreted by the Supreme Court of that state, the 1956 personal property tax levy made by appellant, Spokane County, on the "Wherry Act Leaseholds" here involved could not have become a valid or effective lien until the tax levy was made by the County Commissioners in October, 1956; and that consequently, the 1956 levy was not an encumbrance of such leaseholds prior to June 15, 1956, the effective date of the first proviso of Section 511. The determinations made by the designee of the Secretary of Defense for the years 1956 and 1957 under Section 511 for the project here in question were substantially in excess of the personal property tax levies made by appellant, Spokane County, for those years on the same leaseholds. The District Court held, therefore, that the personal property levies were invalid in their entirety and that appellant did not have a lien on the deposit made with the court or on any award to be entered. Appellant's tax claim was therefore rejected. (R. 30-31.)

SUMMARY OF ARGUMENT

The Congress may immunize those with whom the United States deals from state and local taxation either conditionally, unconditionally, in part, or in toto.

The Supreme Court, in *Offutt Housing Co. v. Sarpy County,* 351 U.S. 253, held that the Congress had subjected the interest of a lessee in a so-called Wherry Act Military Housing Project to state and local taxation. Shortly after the *Offutt* decision the Congress conditioned its consent to such taxation upon the recognition by the state and local taxing authorities of a deduction or credit in an amount to be determined by the Secretary of Defense or his designee for payments made by the Federal Government with respect to the property. The purpose of the conditional consent and the deduction device was to eliminate duplication of payments to state and local taxing authorities in respect to federally owned property. Were it not for the deduction from the tax bill the operator of a project would provide the state and local taxing authorities with revenue for activities already paid for in full by the Federal Government.

The emergency school assistance program carried on by the Department of Health, Education and Welfare in areas where such activities as so-called Wherry Act Military Housing Projects are located falls clearly within the federal payments to state and local taxing and other public agencies which the Congress directed be included in the determinations provided for in Section 511.

ARGUMENT

Federal Assistance Payments to Local Agencies for the Operation of Educational Facilities are Properly Includible in Determinations Made Pursuant to Section 511 of the Housing Act of 1956.

In its specifications of error (Br. 4-5), appellant asserts that the District Court was in error in holding that the determinations made by the Secretary of Defense were not judicially reviewable. In the portion of its brief which is devoted to this point, however, appellant expressly disclaims any attempt to seek judicial review of the determination made by the Secretary of Defense. Instead, it challenges, solely on legal grounds, the propriety of merely one item in the Secretary's determination, namely the inclusion of payments for school operation pursuant to the Act of September 30, 1950 (referred to in the determination as Public Law 874, 81st Cong.). (Br. 21-23.) A brief review of the relevant statutory provisions will quickly demonstrate the error in appellant's contention.

In *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, the Supreme Court held that Congress had subjected the interest of a lessee in "Wherry Act Leaseholds" to state and local taxation. This decision was rendered in 1956, at a time when Congress had under consideration legislation which subsequently became

the Housing Act of 1956. (R. 25.) In order to meet the situation resulting from the *Offutt* decision, Congress enacted Section 511 of the Housing Act of 1956 as an amendment to Section 408 of the Housing Amendments of 1955, c. 783, 69 Stat. 635. (Appendix, *infra.*)[3] In Section 511 of the Housing Act of 1956, Congress established a simple and logical procedure for the handling of state and local tax problems in connection with military housing projects constructed under the Wherry Act. Congress did not seek to fully immunize its lessees from local taxes, as it had authority to do,[4] but instead recognized the full effect of the *Offutt* decision and provided a fair and equitable method for the taxation of the operators of such projects.

It provided that the operators of these projects should not be exempt from state or local taxes, but that there should be deducted from the taxes otherwise payable by such operators the amounts of any payments made by the Federal Government with respect to the property and the amounts of any expenditures made by the Federal Government or operator

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[3] The amendment made by the Housing Act of 1956 was to insert all the material in Section 408 appearing after the first sentence.

[4] *Carson v. Roane-Anderson Co.*, 342 U.S. 232; *General Electric Co. v. State of Washington*, 347 U.S. 909; *United States v. City of Detroit*, 355 U.S. 466; *City of Detroit v. Murray Corp.*, 355 U.S. 489.

for streets, sewers, lighting, etc., and for "any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority." The purpose of this provision is obvious: Since state and local taxes are the source of the funds available to a state or local agency for the provision of streets, sewers, lighting, police and fire services and other services normally available for residential property, Congress intended that the state or local authorities should not be deprived of such revenue if it must provide these services to a housing project on federally owned property as here. If, on the other hand the Federal Government or operator has provided some of these services directly, or has made payments to the state or local agency for the provision of such services, the state or local agency may not be permitted to collect the full taxes, for if it were permitted to do so, it would, to the extent of the federal payments, be receiving double revenue for the same services. In order to remove this possibility, Congress therefore provided for an equitable adjustment by deducting from the taxes otherwise payable the amounts expended for services or facilities customarily provided by the state or local taxing authorities.

The legislative history of Section 511 clearly demonstrates that the foregoing exposition fully squares with the legislative intent. That history discloses

that Congress intended that states and communities should receive the same revenue from these housing projects as they would from similar property, but that in calculating the revenue to be received there should be included payments or expenditures made by the Federal Government and operator. Thus, the report of the House Committee, referring to Section 603, which subsequently became Section 511 of the Act as passed (R. 25), stated as follows (H. Rep. No. 2363, 84th Cong., 2d Sess., pp. 4849 (3 U.S.C. Cong. & Adm. News (1956) 4509, 4555-4556)):

> Section 603 of the bill would expressly provide that nothing contained in title VIII or other law shall be construed to exempt from State or local taxes or assessments any right, title, or other interest of a lessee from the Federal Government with respect to any property covered by a mortgage insured under that title. However, the section would provide that any such taxes or assessments must be reduced (from the amount otherwise levied or charged) by such amount as the Federal Housing Commissioner determines to be equal to (1) any payments in lieu of taxes made by the Federal Government to the local taxing bodies with respect to the property plus (2) any expenditures made by the Federal Government for streets, utilities, and other services for or with respect to the property. ***
>
> It would thus be made clear that States and communities, under adequate State tax statutes, would be able to obtain from Wherry Act projects taxes and assessments which, with payments and expenditures by the Federal Government for

> services in connection with the projects, would equal the taxes and assessments collected by the local taxing officials from other similar property.

Appellant seemingly contends, however, that payments for the operation of schools are not includible in the deductions specifically provided by Congress. Not only do such payments come within the express statutory language concerning "payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property", and "expenditures made by the Federal Government" for "services or facilities which are customarily provided by the State, county, city, or other local taxing authority", but the legislative history expressly indicates that school payments were among the items concerning which the Congress legislated. In two separate sentences in its report the House Committee referred to the fact that payments or expenditures had been made by the Federal Government for the provision of schools or school facilities. The report reads (H. Rep. No. 2363, *supra,* p. 49 (3 U.S.C. Cong. & Adm. News, p. 4556)):

> However, as a large portion of the projects have not been subject to State and local taxes, payments in lieu of taxes have frequently been made to local taxing officials in exchange for usual services, such as schools, furnished to the projects. Also, many expenditures have been made by the Federal Government for streets, utilities, schools, and other services normally furnished by taxing bodies.

Clearly, Congress intended that a computation should be made of payments or expenditures by the Federal Government for services or facilities normally financed by state or local taxes. The state or local taxes otherwise collectible from the federal operator should be reduced by the amount of such payments or expenditures, for otherwise the state or local taxing agency would in effect be paid twice for the same services or facilities. This was made clear beyond all question by the concluding language of the House Committee on this section of the bill. The Committee stated (H. Rep. No. 2363, *supra,* p. 49, (3 U.S.C. Cong. & Adm. News, p. 4556)):

> As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, it is important that no payments be made to communities which would constitute a windfall over and above normal taxes. Consequently, it is very important to assure that the project does not duplicate payments for services furnished to it. This duplication would be avoided under the provisions in the bill for deductions from tax payments, as explained above.

Notwithstanding the clearly expressed Congressional intention that the states or local communities should not receive double compensation through federal payments and through taxation for services or facilities paid for or financed by the Federal Government or operator, and notwithstanding the fact that

payments for school operation were plainly intended to be included in this statutory scheme which Congress established, appellant nevertheless contends that the payments for school operation which it received should not be taken into account in the determination which the Secretary of Defense has made. Appellant must certainly recognize that schools are a service or facility normally provided by state or local agencies and that the funds for the operations of schools are normally provided by state or local taxation. If appellant were permitted to collect the full tax otherwise due, without deduction for federal school payments, it would become abundantly clear that to the extent of such payments it would be collecting twice for the same services. This would violate the express Congressional command that the housing project in question shall "not duplicate payments for services furnished to it." Such a duplication of payments clearly constitutes a "windfall" as Congress stated. Seizing upon the word "windfall" however, appellant argues (Br. 23) that the federal payments for school operation were based on need and are not a substitute for local taxes. This is a mere play on words and is wholly incorrect.

Section 1 of the Act of September 30, 1950 (Appendix, *infra*), sometimes referred to in the record as Public Law 874, 81st Cong., contains the Congressional declaration of policy relating to school assist-

ance payments. That section expressly recognizes that the need for such payments arises from the reduction in local revenues resulting from the acquisition of property by the United States. Section 2 of the Act (Appendix, *infra*) sets forth the determinations which are a necessary prerequisite to the furnishing of school assistance. Under this section assistance may not be furnished unless it is found that the acquisition of property by the Federal Government has resulted in a loss of revenue to the local educational agencies and that such agencies are not being compensated for the loss of revenue by other federal payments. This statute thus makes it clear, as does Section 511 of the Housing Act of 1956, that Congress intended to reimburse the local authorities who were deprived of their normal sources of revenue, but that such reimbursement should be limited to the amount of revenue lost and no more. In the school assistance program this is made clear by the sections referred to; in the Housing Act it is made clear by the statutory provisions and legislative history previously noted.

Appellant appears to contend that the Congress in enacting Section 511 did not intend that legislation to in any way mesh with the federal school assistance program carried on by the Department of Health, Education and Welfare pursuant to the Act of September 30, 1950. However, the very purpose of Section 511, as set forth in its legislative history quoted

supra, was to "assure that the project does not duplicate payments." The reason the Congress enacted Section 511 is made patently clear from its legislative history. In view of the Supreme Court's interpretation of the *Offutt* decision, *supra,* of the Wherry Act and the Military Leasing Act, it became apparent that payments to local taxing and other public agencies would be duplicated if both the taxes authorized by *Offutt, supra,* and the special emergency aid programs were allowed. Therefore, the Congress enacted Section 511 in order to guard against excess revenues being paid to local taxing authorities by the Federal Government in respect to federal property. Section 511 provides *inter alia* that the determination be based upon services and "payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property." The short of it is that payments made under the school assistance program are among the very payments the Congress intended should not be duplicated because of the permissive taxation found in *Offutt, supra,* and authorized by Section 511.

Had the Congress intended that certain federal payments such as the emergency school assistance payments here under consideration be ignored for the purposes of Section 511 determinations, it would have so stated. However, the Congres not only did not point the way for such a construction but, indeed,

it specifically rejected it by providing in Section 511 for the determination to be equal to "any payments *** to the local taxing or other public agencies ***" by the Federal Government.

Appellant's right to tax the property is specifically conditioned upon the recognition of the Section 511 determination and that determination must, by the Congressional mandate, include all federal payments to not only the local taxing but to all other public agencies as well. It is inescapable that the law requires the inclusion of the emergency school payments as part of the determination.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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April_____, 1959.

APPENDIX

Act of September 30, 1950, C. 1124, 64 Stat. 1100:

DECLARATION OF POLICY

SECTION 1. In recognition of the responsibility of the United States for the impact which certain Federal activities have on the local educational agencies in the areas in which such activities are carried on, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following sections of this Act) for those local educational agencies upon which the United States has placed financial burdens by reason of the fact that,—

(1) the revenues available to such agencies from local sources have been reduced as the result of the acquisition of real property by the United States; or

(2) such agencies provide education for children residing on Federal property; or

(3) such agencies provide education for children whose parents are employed on Federal property; or

(4) there has been a sudden and substantial increase in school attendance as the result of Federal activities.

(20 U.S.C. 1952 ed., Sec. 236.)

FEDERAL ACQUISITION OF REAL PROPERTY

SEC. 2 [as amended by Sec. 1, Act of August 8, 1953, c. 402, 67 Stat. 530, and Sec. 201, Act of August 3, 1956, c. 915, 70 Stat. 968]. (a) Where the Commissioner, after consultation with any local educational agency and with the appropriate State educational agency, determines for the fiscal year beginning July 1, 1950, or for any of the seven succeeding fiscal years—

(1) that the United States owns Federal property in the school district of such local educational agency, and that such property (A) has been acquired by the United States since 1938, (B) was not acquired by exchange for other Federal property in the school district which the United States owned before 1939, and (C) had an assessed value (determined as of the time or times when so acquired) aggregating 10 per centum or more of the assessed value of all real property in the school district (similarly determined as of the time or times when such Federal property was so acquired); and

(2) That such acquisition has placed a substantial and continuing financial burden on such agency; and

(3) that such agency is not being substantially compensated for the loss in revenue resulting from such acquisition by (A) other Federal payments with respect to the property so acquired, or (B) increases in revenue accruing to the agency from the carrying on of Federal activities with respect to the property so acquired,

then the local educational agency shall be entitled to receive for such fiscal year such amount as, in the judgment of the Commissioner, is equal to the continuing Federal responsibility for the additional financial burden with respect to current expenditures placed on such agency by such acquisition of property, to the extent such agency is not compensated for such burden by other Federal payments with respect to the property so acquired. Such amount shall not exceed the amount which, in the judgment of the Commissioner, such agency would have derived in such year, and

would have had available for current expenditures, from the property acquired by the United States (such amount to be determined without regard to any improvements or other changes made in or on such property since such acquisition), minus the amount which in his judgment the local educational agency derived from other Federal payments with respect to the property so acquired and had available in such year for current expenditures.

(b) For the purpose of this section—

(1) The term "other Federal payments" means payments in lieu of taxes, and any other payments, made with respect to Federal property pursuant to any law of the United States other than this Act, and property taxes paid with respect to Federal property, whether or not such taxes are paid by the United States.

*   *   *   *

(20 U.S.C. 1952 ed. Supp. IV, Sec. 237)

Housing Amendments of 1955, c. 783, 69 Stat. 635:

SEC. 408 [as amended by Sec. 511, Housing Act of 1956, c. 1020, 70 Stat. 1091]. Nothwithstanding the provisions of Section 401 of this Act, the provisions of title VIII of the National Housing Act in effect prior to the enactment of the Housing Amendments of 1955 shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be $12,-500,000. Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII; PROVIDED, That no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow

removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property; **AND PROVIDED FURTHER**, That the provisions of this section shall not apply to properties leased pursuant to the provisions of section 805 of the National Housing Act as amended on or after August 11, 1955, which properties shall be exempt from State or local taxes or assessments.

(42 U.S.C. 1952 ed., Supp. IV, Sec. 1594, note.)

No. 16236

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WASHIB ULLAH,

Appellant,

vs.

RICHARD C. HOY, Acting District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

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FILED

FEB - 8 1960

FRANK H. SCHMID, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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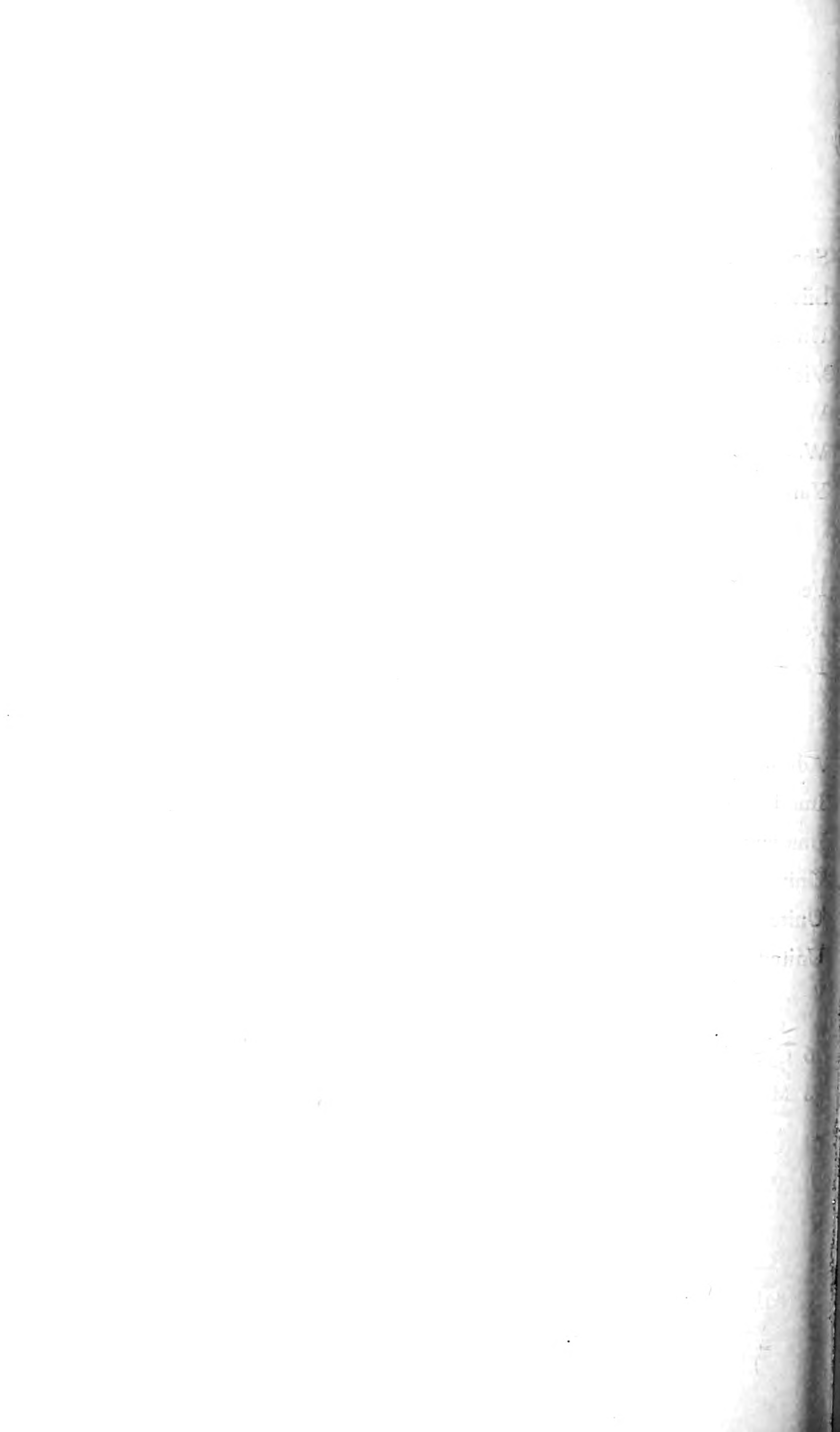

No. 16236

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WASHIB ULLAH,

Appellant,

vs.

RICHARD C. HOY, Acting District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

Appellant instituted an action in the court below seeking review of an order of deportation outstanding against him [Tr. 2-4].[1] The District Court had jurisdiction of appellant's action under the provisions of Section 10 of the Act of June 11, 1946 (Administrative Proc. Act), 60 Stat. 243, 5 U. S. C. A. Section 1009 [*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955)], and since its judgment [Tr. 23] was a final decision, jurisdiction is conferred upon this Court by 28 U. S. Code, Section 1291.

---

[1]"Tr." indicates references to the Clerk's Transcript of Record, which apparently is being considered in its original form. "R." indicates references to the Reporter's Transcript of Proceedings. References to appellant's Opening Brief will be indicated by "Br." Defendant's (appellee's) Exhibit A will sometimes be abbreviated "Ex. A."

Statement of the Case.

Appellant is an alien, a native of Pakistan, formerly British East India. He last entered the United States at New York, New York, on June 9, 1944 [Ex. A; Tr. 20].

On February 13, 1946 a warrant of arrest was issued by the District Director, Immigation and Naturalization Service, San Francisco, California, charging that appellant was subject to deportation on the following grounds [Ex. A; Tr. 20]:

(1) The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;

(2) The Immigration Act of May 26, 1924, as amended, in that, he is an alien ineligible to citizenship and was not entitled to enter the United States under any exceptions of paragraph (c) Section 13 thereof;

(3) The Act of February 5, 1917, in that at the time of entry, he was unable to read the English language, or some other language or dialect, including Hebrew or Yiddish, although at that time over 16 years of age and physically capable of reading and was not exempt from the literacy test by any of the provisions of Section 3 of said Act.

Pursuant to the aforementioned warrant of arrest a deportation hearing was held at San Francisco, California, on February 19, 1946 and March 4, 1946. On March 12, 1946 the Presiding Inspector rendered his opinion, including proposed findings of fact, proposed conclusions of law, and proposed order, recommending that appellant be deported to India on the charges stated in the warrant of arrest. On March 28, 1948, the Acting Com-

missioner of Immigration adopted the findings of fact and conclusions of law proposed by the Presiding Inspector and ordered that appellant be deported to India on the charges contained in the warrant of arrest. This order was affirmed by the Board of Immigration Appeals, Department of Justice, on April 1, 1946 [Ex. A; Tr. 20-21].

Under date of March 27, 1947 appellant was informed by registered letter return receipt requested that authority had been granted to stay deportation until July 1, 1947, on condition that he depart from the United States voluntarily or reship foreign one way. He was further informed that failure to depart by July 1, 1947 would result in deportation in accordance with the provisions of the outstanding warrant of deportation [Ex. A; Tr. 21].

On April 1, 1949 the Assistant Commissioner of Immigration moved the Board of Immigration Appeals, Department of Justice, to enter an order amending the outstanding order and warrant of deportation to provide for deportation to Pakistan, because of the separation of the Dominions of India and Pakistan, and deleting therefrom the ground of deportability based upon the alien's ineligiblity to citizenship. On May 6, 1949 the Board of Immigration Appeals granted this motion [Ex. A; Tr. 21].

On September 7, 1951 appellant moved that the hearing be reopened to permit him to apply for suspension of deportation. On October 11, 1951 the Assistant Commissioner of Immigration denied appellant's motion; and on December 6, 1951 appellant's appeal from the order of denial was dismissed by the Board of Immigration Appeals [Ex. A; Tr. 21].

On January 22, 1958 appellant filed a complaint [Tr. 2-4] in the court below seeking review of his deportation

proceedings [Tr. 4]. After answer [Tr. 8-11], the District Court by letter dated April 7, 1958 addressed to counsel for the parties, gave notice that the action had been calendared for May 5, 1958 for pre-trial conference and setting [Tr. 7]. This pre-trial conference and setting was thereafter continued to May 12, 1958 by stipulation of the parties and order of court [Tr. 14-15].

The District Court had received the record of appellant's deportation proceedings on Friday, May 9, 1958 and had reviewed it [R. 6].[2] When the pre-trial conference convened on May 12, 1958, the Court asked counsel whether there was "anything more to do in this case than to submit it on the transcript" [R. 2]. After a colloquy between the court and counsel representing appellant at the hearing, the latter stated:

> "Mr. Sturr: Very well, your Honor. All I can do is submit it." [R. 7].

Thereafter the record of appellant's deportation proceedings was received in evidence [Ex. A] and the District Court ordered appellant's complaint dismissed [R. 7]. Findings of Fact, Conclusions of Law, and Judgment were thereafter entered [Tr. 19-23].

Issues Presented.

1. Was the District Court authorized to render a final decision at the pre-trial conference?

2. Did the action of the District Court in rendering a final decision at the pre-trial conference deprive appellant of procedural due process of law in violation of the Fifth Amendment?

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[2]While not shown in the record, counsel for appellee delivered Exhibit A to the Court at the latter's request.

Statutes and Rules Involved.

Section 10 of the Act of June 11, 1946 [Administrative Proc. Act], 60 Stat. 243, 5 U. S. C., Section 1009 provides in part:

> "Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Rule 1, Federal Rules of Civil Procedure, 28 U. S. C. A., provides:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 16, Federal Rules of Civil Procedure, 28 U. S. C. A., provides:

> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

Rule 57, Federal Rules of Civil Procedure, 28 U. S. C. A. provides:

> "The procedure for obtaining a declaratory judgment pursuant to Title 28 U. S. C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

ARGUMENT.

I.

The District Court Was Authorized to Render a Final Decision at the Pre-Trial Conference, Since There Were No Issues of Fact to Be Tried.

The Federal Rules of Civil Procedure were designed to effect the "just, speedy, and inexpensive determination of every action" [Rule 1, Fed. Rules of Civ. Proc.; 3 Moore's Fed. Practice, Sec. 16.02]. Consonant with this purpose Rule 16 confers broad discretion upon the District Court as to what matters should be determined at a pre-trial conference. As the author in 6 Cyclopedia of Federal Procedure, Section 19.11, states (p. 284):

> "In its text, Rule 16 lists five specific elements which the court may order to be taken up in pre-trial conference. These are clearly not all-inclusive, because after naming them the Rule suggests as appropriate for consideration at a pre-trial conference 'such other matters as may aid in the disposition of the action.' This, 'an omnium gatherum clause of the very broadest generality,' *is virtually as broad an in-*

vitation to the employment of judicial discretion in pre-trial practice as could be phrased, as it makes 'aid in the disposition of the action' the only test of appropriate subject matter of a pre-trial conference. * * *" [Emphasis added.]

Whereat pre-trial, admissions and pleadings show that no issue of fact remains to be determined, the Court has power to decide the issues of law and enter judgment thereon.

Holcomb v. Aetna Life Insurance Co., 255 F. 2d 577 (10th Cir. 1958), cert. den. 350 U. S. 986 and 358 U. S. 879.

Biaggi v. Giant Food Shopping Center, 244 F. 2d 786 (Dist. Col. Cir. 1957);

MacMaugh v. Baldwin, 239 F. 2d 67 (Dist. Col. Cir. 1956);

Newman v. Granger, 141 Fed. Supp. 37 (W. D. Pa. 1956), aff'd 239 F. 2d 384 (3d Cir. 1957);

Lane v. Brown, 63 Fed. Supp. 685 (D. C. Mich. 1945);

McComb v. Trimmer, 85 Fed. Supp. 565 (D. C. N. J., 1949);

Silvera v. Broadway Department Store, 35 Fed. Supp. 625 (S. D. Calif. 1940).

And a court at the pre-trial conference has power to compel the parties to agree to all facts concerning which there can be no real dispute [*Holcomb v. Aetna Life Insurance Co., supra; Berger v. Branner,* 172 F. 2d 241 (10th Cir. 1949), cert. den. 337 U. S. 941; *McDonald v. Bowles,* 152 F. 2d 741 (9th Cir. 1945); *Package Machinery Co. v. Hayssen Manufacturing Co.,* 164 Fed. Supp. 904 (E. D. Wisc. 1958), aff'd 266 F. 2d 56 (7th Cir. 1959)].

There were no issues of fact to be tried in the District Court. During the pre-trial conference hearing, counsel then representing appellant failed to present any genuine issues of fact to be tried,[3] and eventually submitted the cause for decision [R. 7]. This is not surprising in view of the fact that appellant merely sought judicial review of an order of deportation outstanding against him. Deportation orders, not generally raising any issues of fact for trial *de novo* in the District Court, are frequently determined on motions for summary judgment [*Miyaki v. Robinson,* 257 F. 2d 806 (7th Cir. 1958), cert. den. 358 U. S. 894; *Alexiou v. Rogers,* 254 F. 2d 782 (Dist. Col. Cir. 1958); *Nani v. Brownell,* 247 F. 2d 103 (Dist. Col. Cir. 1957), cert. den. 355 U. S. 870; *Vichos v. Brownell,* 230 F. 2d 45 (Dist. Col. Cir. 1958); *Melachrinos v. Brownell,* 230 F. 2d 42 (Dist. Col. Cir. 1956); *Asikese v. Brownell,* 230 F. 2d 34 (Dist. Col. Cir. 1956)]. Similarly, where at pre-trial, no issue of fact remains to be determined, judgment may be summarily entered [*Holcomb v. Aetna Life Insurance Co., supra; Biaggi v. Giant Food Shopping Center, supra; MacMaugh v. Baldwin, supra; Newman v. Granger, supra; Lane v. Brown, supra; McComb v. Trimmer, supra; Silvera v. Broadway Department Store, supra*].

Appellant contends that there existed an issue as to voluntary departure (Br. 8-9), which "should have been determined in a proper trial" (Br. 9). The record discloses that after appellant had been granted voluntary departure and he failed to depart by the date specified; he moved that the hearing be reopened to permit him to ap-

---

[3]Counsel representing appellant at the pre-trial hearing must be presumed to have been familiar with the issues of the case; since one of the express purposes of Rule 16 is "simplification of the issues."

ply for suspension of deportation which motion was denied [Ex. A; Tr. 21] and in his complaint appellant prays, *inter alia,* "that the United States Immigration and Naturalization Service be directed to reopen the deportation hearing to permit filing of another application for voluntary departure, on the ground, among other things, that plaintiff is not statutorily ineligible for voluntary departure" [Tr. 4].

Whether a deportable alien is to be permitted voluntarily to depart the United States or whether deportation is to be suspended is a matter within the discretion of the Attorney General [*Hintopoulous v. Shaughnessy,* 353 U. S. 72, 77 (1957); *Jay v. Boyd,* 351 U. S. 345, 354 (1956); *Gugiani v. Barber,* 261 F. 2d 709 (9th Cir. 1958), dismissed pursuant to stipulation, 358 U. S. 924]. Similarly, rehearings in administrative proceedings are not a matter of right, but lie within the discretion of the agency making the order [*United States v. Pierce Auto Lines,* 327 U. S. 515, 535 (1946); *I. C. C. v. Jersey City,* 322 U. S. 503, 514-519 (1944)]; and this rule is applicable to motions to reopen or to reconsider made in deportation proceedings [*Wolf v. Boyd,* 238 F. 2d 249, 253 (9th Cir. 1957), cert. den. 353 U. S. 936; *Arakas v. Zimmerman,* 200 F. 2d 322, 323-325 (3d Cir. 1952)].

Conceding that the courts may review the exercise of discretion by the Attorney General, such review does not require a trial. This is illustrated by those cases where discretionary action was reviewed on motions for summary judgment [*Miyaki v. Robinson, supra; Alexiou v. Rogers, supra; Vichos v. Brownell, supra; Melachrinos v. Brownell, supra, Asikese v. Brownell, supra*].

Bowdidge v. Lehman, 252 F. 2d 366 (6th Cir. 1958), relied upon by appellant (Br. 8) is distinguishable from the case at bar. In that case Rule 16 was not involved,

as the court merely dismissed the Complaint without notice or hearing of any kind. Appellant, in contrast, was given ample opportunity to be heard at the pre-trial conference hearing, of which he had adequate notice.

In *Clay v. Callaway,* 177 F. 2d 741 (5th Cir. 1949), also relied upon by appellant (Br. 7), two judgments were involved, both rendered at pre-trial conferences. The Court of Appeals upheld the first judgment, stating (p. 743):

> "The first above stated judgment was correct, *no facts being involved.*" [Emphasis added.]

It was only with respect to the second judgment in the *Callaway* decision, where the District Court sought to resolve disputed issues of fact at the pre-trial conference that the Court of Appeals reversed. The *Callaway* case is thus in accord with the possition of appellee.

Moreover, appellant's action in the court below was one for a declaratory judgment, as appellant recognizes in his opening brief (Br. 8). Rule 57, Federal Rules of Civil Procedure, provides, *inter alia,* that the "court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." In the light of this Rule, and in view of the authorities previously cited, the District Court did not violate the rules, as appellant contends (Br. 5-7), but rather acted in accordance with their liberal purpose to "secure the just, speedy, and inexpensive determination of every action" [Rule 1, Fed. Rules of Civ. Proc.].

II.

The Action of the District Court in Rendering a Final Decision at the Pre-Trial Conference Did Not Deprive Appellant of Procedural Due Process of Law in Violation of the Fifth Amendment.

Preliminarily, it should be noted that judicial review of deportation orders is not constitutionally required except by means of *habeas corpus;* and prior to the Immigration and Nationality Act of 1952, *habeas corpus* was the only mode of review available [*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955); *Heikkila v. Barber,* 345 U. S. 229 (1953). None of the decisions upon which appellant relies hold that review of deportation orders requires a regular trial. Indeed, both *Kwong Hai Chew v. Colding,* 344 U. S. 590, 597 (1953) and *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U. S. 86, 101 (1903) intimate that a hearing before an executive or administrative tribunal is constitutionally sufficient.[4] Other cases relied upon by appellant deal with the fairness of proceedings before immigration authorities, rather than with the nature of review by the courts [*Wong Yang Sung v. McGrath,* 339 U. S. 33 (1949); *Bridges v. Wixon,* 326 U. S. 120 (1945); *Bilokumsky v. Tod,* 263 U. S. 149 (1923)].

Therefore, assuming, *arguendo,* that the action of the court below was irregular, appellant's attempt to show a constitutional violation should fail. This is especially

---

[4]In *Kwong Hai Chew v. Colding, supra,* the Supreme Court declared (p. 597):

> ". . . Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing *at least before an executive or administrative tribunal.* [Emphasis added.]

true in view of the rule that the allowance of a petition for declaratory relief is discretionary with the trial court [*Garcia v. Brownell,* 236 F. 2d 356, 359 (9th Cir. 1956) and authorities cited therein; *Fletes-Mora v. Brownell,* 231 F. 2d 579 (9th Cir. 1955)].

However, as previously discussed (Part I of Argument, *supra*), the action of the District Court was not irregular, but was authorized by the Federal Rules of Civil Procedure. Appellant received due notice of the pretrial conference, which implicitly informed him that the court might take any and all action authorized by Rule 16, Federal Rules of Civil Procedure. Appellant appeared at the hearing and agreed to submit the cause to the court for decision [R. 7]. A regular trial of the case would have been a futile gesture, since there were no issues of fact to be tried. Under these circumstances, it is submitted that appellant was not deprived of procedural due process of law in violation of the Fifth Amendment.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 16238

United States Court of Appeals

for the Ninth Circuit

ANTHONY FRISONE, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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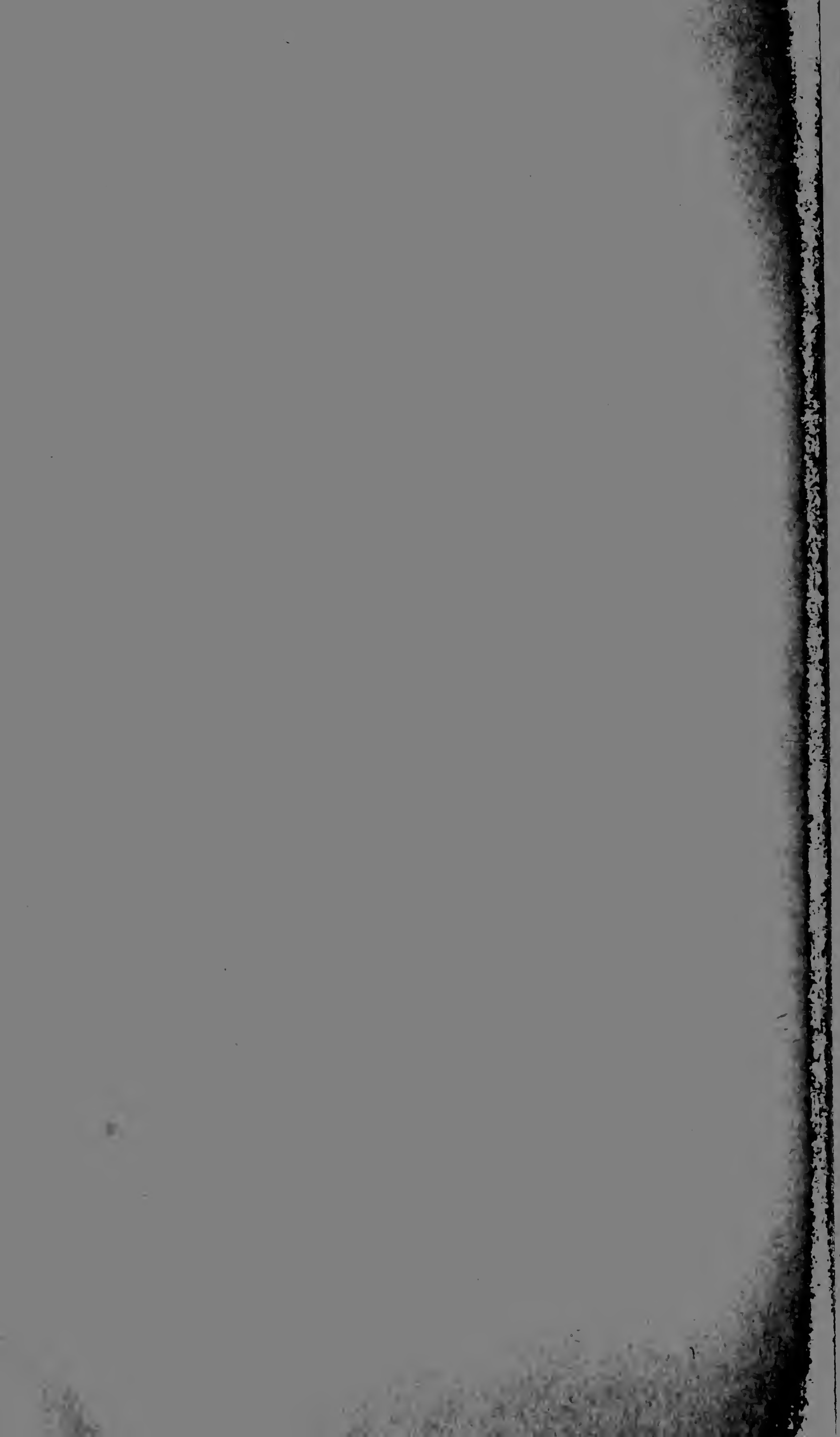

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Witnesses For Government:

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—direct 93

Podolsky, Murray
—direct 97

Smith, Benjamin
—direct 90
—cross 91

Smith, Inga Constance
—direct 83
—cross 86

Verdict of the Jury 32

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CANTILLON & CANTILLON,
JAMES P. CANTILLON,
9441 Wilshire Boulevard,
Beverly Hills, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT J. JENSEN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California. [1]*

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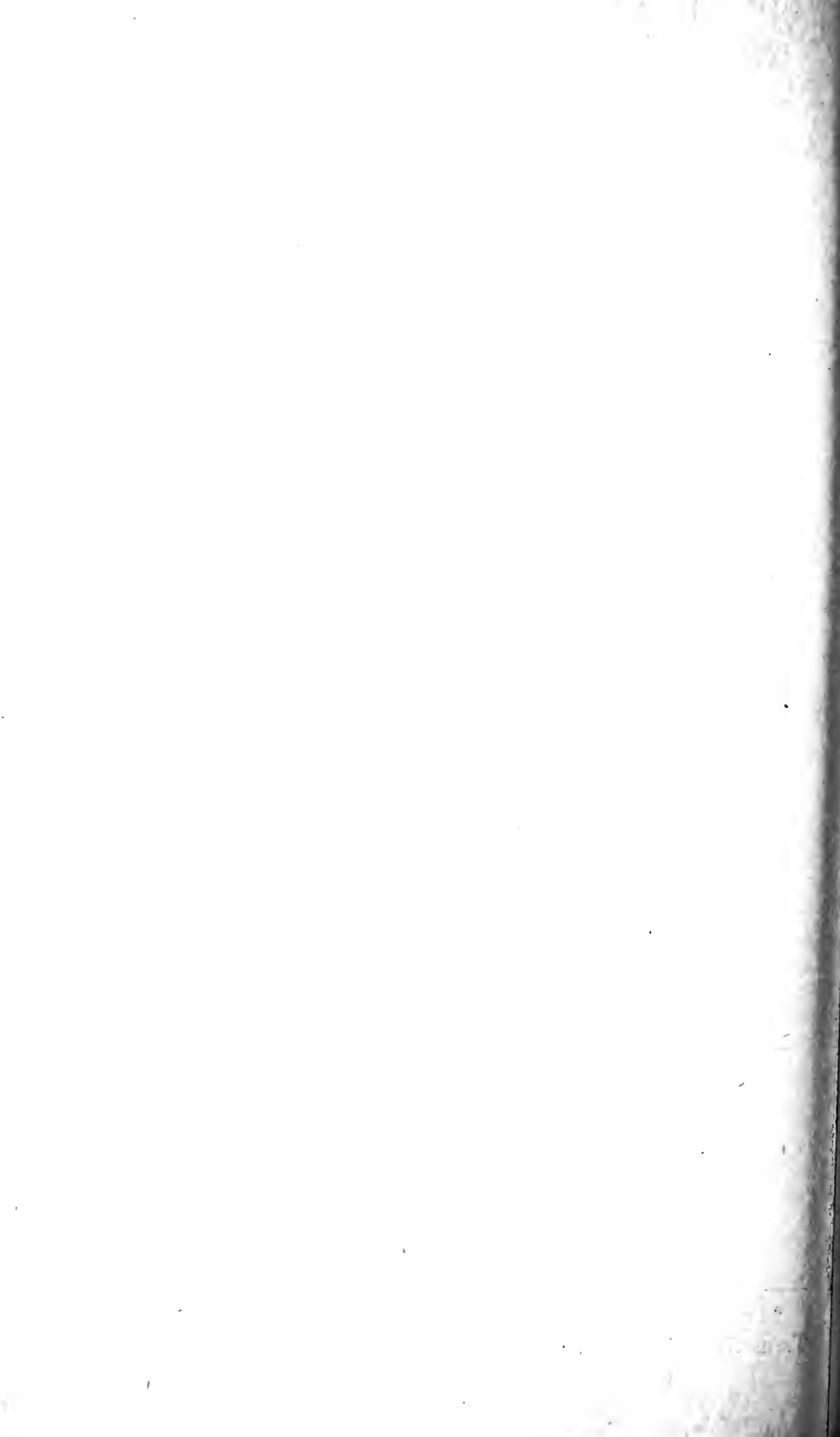
* Page numbers appearing at bottom of page of Original Transcript of Record.



United States District Court, Southern District of California, Central Division

September, 1957, Grand Jury

No. 26307 CD

UNITED STATES OF AMERICA, Plaintiff,

vs.

ANTHONY FRISONE, and NORA MATHIS FRISONE, Defendants.

INDICTMENT

[U.S.C., Title 18, Sec. 1621—Perjury]

The grand jury charges:

Count One

[U.S.C., Title 18, Sec. 1621]

I.

On or about March 26, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the trial of the case of United States of America v. Anthony Frisone, Cr. #25580-CD, was commenced in the United States District Court for the Southern District of California, Central Division, before the Honorable Ernest A. Tolin, Judge of said Court, sitting in the City of Los Angeles and before a jury duly impaneled to try said case.

II.

During the course of said trial and on or about

the said March 26, 1957, the defendant Nora Mathis Frisone appeared as a [2] witness and was called to the stand to testify on behalf of the defendant in said case of United States of America v. Anthony Frisone, Cr. #25580-CD. Said defendant Nora Mathis Frisone was duly sworn in open court, by Wayne E. Payne, the Deputy Clerk of said Court, who was then and there competent authority to administer an oath to said defendant Nora Mathis Frisone in said Court and in said case and the defendant Nora Mathis Frisone then and there swore upon oath to testify the truth, the whole truth, and nothing but the truth, in the matter then on trial. The said defendant Nora Mathis Frisone did thereafter take the witness stand and testify under oath in said case at the time and place aforesaid and while so testifying under oath, said defendant Nora Mathis Frisone did knowingly, wilfully and contrary to said oath, testify falsely in respect to material matters of said case in the answers made by her in response to questions put to her.

III.

Said defendant Nora Mathis Frisone did so testify as follows:

"Q. Nora, did you work in the house Mi Rancho at Rosarita Beach?

A. I was there one night."

(Reporter's transcript, pages 76, 77.)

* * * * *

"Q. Do you recall seeing Anthony Frisone at Mi Rancho? A. No, I do not.

Q. Can you state definitely at the time that you were there that he was not there?

A. Yes, I can.

Q. Then it is your testimony that he was not there? A. I did not see him there.

Q. You were, you say, at Mi Rancho for one night? A. Yes, I was."

(Reporter's Transcript, page 77.) [3]

IV.

In truth and in fact, as the defendant Nora Mathis Frisone well knew at the time of her so testifying, the occasion of her being at Mi Rancho at Rosarita Beach, in the Republic of Mexico, at the time in question, was on or about December 28, 1954, and the defendant Nora Mathis Frisone saw the defendant Anthony Frisone at said time and at said location; both defendants Nora Mathis Frisone and Anthony Frisone participated in and were present at an opening celebration of the said Mi Rancho at the time and place aforesaid, and both said defendants Nora Mathis Frisone and Anthony Frisone engaged in conversations at the time and place aforesaid.

V.

The aforesaid questions were asked and the testimony of the defendant Nora Mathis Frisone hereinbefore set forth were material to the proceedings then being conducted in the case of United States of America v. Anthony Frisone, Cr. #25580-CD, heard in the United States District Court for the Southern District of California, Central Division,

before the Honorable Ernest A. Tolin and a jury duly impanelled, and the whole of the afore-quoted questions and answers were material to a proper and just decision in said case, which case concerned whether or not the defendant Anthony Frisone was guilty of transporting, on or about December 27, 1954, a woman in foreign commerce for prostitution, debauchery, and other immoral purposes in violation of the provisions of Title 18, Section 2421, of the United States Code. [4]

Count Two

[U.S.C., Title 18, Sec. 1621]

I.

The grand jury incorporates by reference thereto and realleges as if again set forth herein all of Paragraphs I and II of Count One of this indictment; and further alleges that the defendant Nora Mathis Frisone, at the time and place aforesaid and under the circumstances aforesaid, further testified as follows:

"Q. (By Mr. Cantillon): When was that, approximately?

A. That was in the spring and summer of 1954.

Q. Did you know Mr. Frisone at that time?

A. No, I did not."

(Reporter's transcript, page 65.)

* * * * *

"Q. (By Mr. Cantillon): Now, sometime in the fall of 1954 did Ginger take up a residence in San Diego County? A. Yes.

Q. And did you go to that residence?

A. Yes, I was there."

(Reporter's transcript, pages 68, 69.)

* * * * *

"Q. (By Mr. Cantillon): Did you know Mr. Frisone during this period of time while you were operating out of Ginger's house in San Diego as a prostitute? A. Casually.

Q. When you say 'casually' what do you mean by that?

A. I think I had met him at the La Madelon where he was working as a bartender.

Q. Had you ever been out with him socially or dated him? [5]

A. No, I don't think so."

(Reporter's transcript, pages 69, 70.)

* * * * *

"Q. Isn't it a fact that on or about the 27th or 28th of December of 1954 that Anthony Frisone drove you across the Mexican border to Tijuana?

A. It is not a fact.

Q. You would say that it is not true, then?

A. It is not true.

Q. Do you say that you knew the defendant Frisone only casually? A. Yes.

Q. When did your acquaintance become more intimate? A. Two or three months later.

Q. Sometime early in 1955?

A. Yes."

(Reporter's transcript, page 76.)

* * * * *

"Q. It is your testimony, is it not, that Mr. Fri-

sone was only casually known to you during the summer of 1954? A. That is right."

(Reporter's transcript, page 83.)

II.

In truth and in fact, as the defendant Nora Mathis Frisone well knew at the time of her so testifying, the said defendant Nora Mathis Frisone knew and was well acquainted with defendant Anthony Frisone in the summer of 1954, she had been frequently in his company during the summer of 1954, and during said period of time they met and accompanied each other on social occasions; and that on or about September 17, 1954, said defendant [6] Nora Mathis Frisone and defendant Anthony Frisone lived together in Los Angeles, California, as man and wife, continuing to live thereafter in such relationship for the remainder of the year 1954.

III.

The aforesaid questions were asked and the testimony of the defendant Nora Mathis Frisone hereinbefore set forth were material to the proceedings then being conducted in the case of United States of America v. Anthony Frisone, Cr. #25580-CD, heard in the United States District Court for the Southern District of California, Central Division, before the Honorable Ernest A. Tolin and a jury duly impanelled, and the whole of the afore-quoted questions and answers were material to a proper and just decision in said case, which case concerned whether or not the defendant Anthony Frisone was

guilty of transporting, on or about December 27, 1954, a woman in foreign commerce for prostitution, debauchery, and other immoral purposes in violation of the provisions of Title 18, Section 2421, of the United States Code. [7]

Count Three

[U.S.C., Title 18, Sec. 1621]

I.

The grand jury incorporates by reference thereto and realleges as if set forth herein in full all the allegations in Paragraph I of Count One of this indictment:

II.

During the course of said trial and on or about said March 26, 1957, the defendant Anthony Frisone appeared as a witness and was called to the stand to testify in his own behalf. Said defendant Anthony Frisone was duly sworn in open court by Wayne E. Payne, a deputy clerk of said Court, who was then and there competent authority to administer an oath to said defendant in said Court and in said case, and the defendant Anthony Frisone then and there swore upon oath to testify to the truth, the whole truth and nothing but the truth, in the matter then on trial. The said defendant Anthony Frisone did thereafter take the witness stand and testify under oath in said case at the time and place aforesaid and while so testifying under oath, said defendant Anthony Frisone did knowingly, wilfully and contrary to said oath testify falsely in respect to material matters of said case in the an-

swers made by him in response to questions put to him.

III.

Said defendant Anthony Frisone did so testify as follows:

"Q. Did you ever have an occasion at any time to go to Mr. DiLeo's establishment in Mexico at Rosarita Beach? A. Yes, I did. I——

Q. When was that, sir?

A. I think it was right after the holidays. I can't remember just exactly which day it was. I believe [8] it was a day off or I was due for a day off after the new year had started, and I drove down—well, Mr. DiLeo had called me and told me he was in operation and that would I come down and look it over and see if—bring the gambling into the club, so I said, 'Well, I'll see if I can come down and look at over.' "

(Reporter's transcript, pages 102, 103.)

* * * * *

"Q. Isn't it true that you actually spent some few days at Mi Rancho between Christmas and New Year's of 1954? A. It is not."

(Reporter's transcript, page 145.)

IV.

That in truth and in fact, as the defendant Anthony Frisone well knew at the time of his so testifying, the defendant Anthony Frisone was present at Mi Rancho, Rosarita Beach, Republic of Mexico, on or about December 28, 1954, on the occasion of the opening of said establishment, and remained

present for at least one day following said date of opening.

V.

The aforesaid questions were asked and the testimony of the defendant Anthony Frisone hereinbefore set forth were material to the proceedings then being conducted in the case of United States of America v. Anthony Frisone, Cr. #25580-CD, heard in the United States District Court for the Southern District of California, Central Division, before the Honorable Ernest A. Tolin and a jury duly impanelled, and the whole of the afore-quoted questions and answers were material to a proper and just decision in said case, which case concerned whether or not the defendant [9] Anthony Frisone was guilty of transporting, on or about December 27, 1954, a woman in foreign commerce for prostitution, debauchery, and other immoral purposes in violation of the provisions of Title 18, Section 2421, of the United States Code. [10]

Count Four

[U.S.C., Title 18, Sec. 1621]

I.

The grand jury incorporates by reference thereto and realleges as if set forth herein in full all the allegations in Paragraph I of Count One of this indictment and all the allegations in Paragraph II of Count Three of this indictment.

II.

And the grand jury further alleges that said de-

fendant Anthony Frisone further testified at the time and place aforesaid and under the circumstances aforesaid, as follows:

"Q. Directing your attention to 1954, and particularly the month of December, what was your occupation at that time?

A. At that time I was employed as a bartender by the La Madelon, Inc. here in Los Angeles."

(Reporter's transcript, page 96.)

* * * * *

"Q. Now, where were you between the week of from December 24, 1954, to January 1, 1955?

A. Well, during the evenings I was employed, still employed by the La Madelon as a bartender, and I went to work generally, I think it was about 9:00 o'clock in the evening or might have been one or two evenings a week that I would go in at 8:00, which we called an early shift, but Christmas—no, I worked Christmas, New Year's day, which would be January the 1st of 1955, I was at my mother's house in San Bernardino. The rest of the time I worked."

(Reporter's transcript, page 102.) [11]

* * * * *

"Q. I see. Now, you worked then, Mr. Frisone, at La Madelon from sometime at the end of August or sometime in August of 1954 until sometime in March of 1955? A. March or April.

Q. And you recall definitely now that Christmas Day you worked at La Madelon?

A. I don't know about Christmas Day.

Q. Christmas night?

A. Christmas night, yes.

Q. Do you recall that definitely? A. Yes.

Q. Could it have been Christmas Eve?

A. Well, wait a minute. Let's get this straight. When you say Christmas night, which do you mean, Christmas Eve or Christmas Day night?

Q. I take it in the common meaning, sir. I mean the night of Christmas Day is Christmas night.

A. No. I couldn't swear positively, but I don't think that I worked.

Q. You don't think that you worked on Christmas Eve? A. No, Christmas Day night.

Q. You didn't work on Christmas Day night?

A. That's right.

Q. Did you work the following night?

A. Yes, sir.

Q. You have an independent recollection of working that night?

A. Well, I wouldn't say an independent recollection, but I worked throughout the week.

Q. Can you state positively that you worked on that night in question? [12]

A. Yes, I can state positively.

Q. And the next day would be the 27th of December. Do you have an independent recollection of having worked that night at La Madelon?

A. I worked throughout the week. I didn't take any extra days off other than I had coming to me.

Q. Do you have an independent recollection of having worked at the La Madelon on the night of December 27, 1954? A. Yes.

Q. You can say definitely?

A. I would say that I worked there on December 19th—27, 1954.

Q. You can say definitely that you did?

A. As best as I can remember.

Q. I appreciate your difficulty, but I am asking, can you remember definitely?

A. When you say 'definitely' just exactly what do you mean? That is not very clear, by your definition of 'definitely'; might be a little different than mine.

Q. Do you have any independent recollection at this time of having worked on that night?

A. Yes.

Q. Do you have an independent recollection of having worked the night of December 28, 1954?

A. Yes.

Q. Can you say definitely that you did?

A. Yes.

Q. Do you have an independent recollection of having worked the night of December 29, 1954?

A. Yes. [13]

Q. You can say definitely that you worked that night?

A. Yes, I can say definitely I worked that night.

Q. Do you have any independent recollection of having worked the night of December 30, 1954?

A. Yes.

Q. Definitely you can say that you did?

A. I definitely can say that I worked December 30th, which would be New Year's Eve of 1954.

Q. I am sorry. I thought December 31st would be.

A. If December 30th was the New Year's Eve, that's the day I worked and I worked the day before it, so that makes it a definite proposition about December 30th."

(Reporter's transcript, pages 126, 127, 128, 129.)

III.

That in truth and in fact, as the defendant Anthony Frisone well knew at the time of his so testifying, the defendant Anthony Frisone was not employed by La Madelon, Inc. at any time during the month of December, 1954.

IV.

The aforesaid questions were asked and the testimony of the defendant Anthony Frisone hereinbefore set forth were material to the proceedings then being conducted in the case of United States of America v. Anthony Frisone, Cr. #25580-CD, heard in the United States District Court for the Southern District of California, Central Division, before the Honorable Ernest A. Tolin and a jury duly impanelled, and the whole of the afore-quoted questions and answers were material to a proper and just decision in said case, which case concerned whether or not the defendant Anthony Frisone was guilty of transporting, on or about December 27, 1954, a woman in foreign commerce for prostitution, debauchery, [14] and other immoral purposes in violation of the provisions of Title 18, Section 2421, of the United States Code. [15]

Count Five

[U.S.C., Title 18, Sec. 1621]

I.

The grand jury incorporates by reference thereto and realleges as if set forth herein in full all the allegations in Paragraph I of Count One of this indictment and all the allegations in Paragraph II of Count Three of this indictment.

II.

And the grand jury further alleges that said defendant Anthony Frisone further testified at the time and place aforesaid, and under the circumstances aforesaid, as follows:

"Q. Let me ask you this: At the time that this took place in December of 1954, did you know your present wife, Nora, at that time?

A. I had met her. I had seen her. I think I had met her. I had seen her.

Q. In December of 1954?

A. Somewhere about that time.

Q. And you would say then that around the first of the year of 1955 your acquaintance with her was casual?

A. No. After the first of the year of 1955—I don't know what the—exactly the date, but we started going out together."

(Reporter's transcript, page 138).

* * * * *

"Q. In mid-December of 1954, did you know your present wife at that time?

A. I was acquainted with her. I had seen her.

Q. Had you ever dated her at that time?

A. No.

Q. Had she ever been in your automobile at that time? [16]

A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took——

Q. Had she been in it while you were with her?

A. No, not while——"

(Reporter's transcript, page 140.)

III.

In truth and in fact, as the defendant Anthony Frisone well knew at the time of his so testifying, the said Anthony Frisone knew and was well acquainted with the defendant Nora Mathis Frisone in the summer of 1954, he having been frequently in her company during the summer of 1954 and during the said period they met and accompanied each other on social occasions; and that on or about September 17, 1954, said defendants Anthony Frisone and Nora Mathis Frisone lived together in Los Angeles, California, as man and wife, continuing to live thereafter in such relationship for the remainder of the year of 1954.

IV.

The aforesaid questions were asked and the testimony of the defendant Anthony Frisone hereinbefore set forth were material to the proceedings then being conducted in the case of United States of America v. Anthony Frisone, Cr. #25580-CD,

heard in the United States District Court for the Southern District of California, Central Division, before the Honorable Ernest A. Tolin and a jury duly impanelled, and the whole of the afore-quoted questions and answers were material to a proper and just decision in said case, which case concerned whether or not the defendant Anthony Frisone was guilty of transporting, on or about December 27, 1954, a woman in foreign commerce for prostitution, debauchery and other immoral purposes in violation of the provisions of Title 18, Section 2421, of the United States Code. [17]

Count Six

[U.S.C., Title 18, Sec. 1621]

I.

The grand jury incorporates by reference thereto and realleges as if set forth herein in full all the allegations in Paragraph I of Count One of this indictment and all the allegations in Paragraph II of Count Three of this indictment.

II.

And the grand jury further alleges that said defendant Anthony Frisone further testified at the time and place aforesaid, and under the circumstances aforesaid, as follows:

"Q. I am going to ask you, Mr. Frisone, whether you remember a conversation at 1315 Wengert, Las Vegas, on June 22, 1956, between yourself and Special Agents Byron C. Wheeler and Leslie B. Deckman of the Federal Bureau of Investigation.

A. Yes, I remember a conversation with them.

Q. Did you at any time during that conversation mention when you had married your wife?

A. No, not to my knowledge. I mean, if I had to remember a conversation I have with everybody I have talked to, why——

Q. Is it not true that you told the agents I have just named, at that conversation, that you had married Nora Mathis Frisone in 1954 in Mexico?

A. It is not true.

Q. That is not true. You can state that positively? A. I can state that positively.

Q. You did not tell them that?

A. I did not tell them that."

(Reporter's transcript, page 139.) [18]

III.

In truth and in fact, as the defendant Anthony Frisone well knew at the time of his so testifying, the defendant Anthony Frisone had said, in a conversation at Las Vegas, on June 22, 1956, between himself and Special Agents Byron C. Wheeler and Leslie B. Deckman of the Federal Bureau of Investigation, that he, the defendant Anthony Frisone, had married Nora Mathis Frisone in 1954 in Mexico.

IV.

The aforesaid questions were asked and the testimony of the defendant Anthony Frisone hereinbefore set forth were material to the proceedings then being conducted in the case of United States of America v. Anthony Frisone, Cr. #25580-CD,

heard in the United States District Court for the Southern District of California, Central Division, before the Honorable Ernest A. Tolin and a jury duly impanelled, and the whole of the afore-quoted questions and answers were material to a proper and just decision in said case, which case concerned whether or not the defendant Anthony Frisone was guilty of transporting, on or about December 27, 1954, a woman in foreign commerce for prostitution, debauchery, and other immoral purposes in violation of the provisions of Title 18, Section 2421, of the United States Code.

A True Bill.

/s/ E. J. PRUD'HOMME,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney. [19]

[Endorsed]: Filed October 30, 1957.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 2, 1957, at Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge.

Deputy Clerk: Mary O. Smith. Reporter: S. J. Trainor.

U. S. Att'y, by Assistant U. S. Att'y: Peter J. Hughes.

Counsel for Defendants: James Cantillon.

Defendants present on bond. (Case 26212.)

Proceedings: For arraignment and plea of each defendant.

Both defendants are arraigned and state their true names are as set forth in the Indictment.

Defendant Anthony Frisone pleads not guilty to counts 3, 4, 5, and 6 of the (six counts) Indictment.

Defendant Nora Mathis Frisone pleads not guilty to counts 1 and 2.

Attorney Cantillon makes a statement.

It Is Ordered that cause is transferred to Judge Clarke for setting and for all further proceedings.

JOHN A. CHILDRESS,
Clerk,

/s/ By MARY O. SMITH,
Deputy Clerk. [21]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 27, 1958, at Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: Wm. A. White. Reporter: Marie Zellner.

U. S. Att'y, by Assistant U. S. Att'y: Robert J. Jensen.

Counsel for Defendants: James P. Cantillon.

Defendants present (on bond). #26212, on O/R) #26307.

Proceedings: For jury trial.

All parties present. It Is Ordered that Case No. 26,212-Cr. trail Case No. 26,307-Cr., and that jury trial proceed in the latter case.

Court orders that a jury be impaneled and trial proceed.

The following jurors, duly impaneled, are sworn to try this case:

1. John Pagliassotti, 2. Floss Tarr, 3. Harry A. Wembridge, 4. William R. Ellerman, 5. Margery H. Calvin, 6. Gene D. Whitfield, 7. Florence Beckelhymer, 8. Elsie M. Bakre, 9. Florence M. Child, 10. Rose G. Levy, 11. Norris E. Read, 12. Elizabeth A. Fox. 1st Alternate Juror: Rebecca Isaacs. 2nd Alternate Juror: Crene K. Dixon.

Further reading of the Indictment is waived.

At noon Court admonishes the jurors not to discuss this case and declares a recess.

At 2:01 p.m. Court reconvenes. All present as before. Both defendants and the jury and the two alternate jurors are present. Court orders trial proceed.

Attorney for Gov't makes opening statement to the jury.

Filed Government's requested jury instructions.

Defendants reserve making opening statement.

Counsel for respective parties enter into preliminary stipulation of facts as to Case No. 25,880-Cr.

Court orders the reporter to make a copy of the stipulation as stated and that said copy will be marked as an exhibit in the case.

Gov't Ex. 1 is received into evidence.

Janet Frances Prideaux is called, sworn, and testifies for Gov't.

At 2:45 p.m. Court excuses the jury.

Court and counsel discuss a question of law.

At 3:11 p.m. Court recesses. At 3:28 p.m. Court reconvenes. All present as before. Both defendants and the jury and the two alternate jurors are present. Court orders trial proceed.

Witness Prideaux resumes the stand and testifies further on behalf of Gov't.

Norma Jean Scholes is called, sworn, and testifies for Gov't.

Paul Carmello is called, sworn, and testifies for Gov't.

Court admonishes the jurors not to discuss this cause and orders cause continued to May 28, 1958, 10 a.m., for further jury trial.

At 4:45 p.m. Court adjourns.

JOHN A. CHILDRESS,
Clerk,

By WM. A. WHITE,
Deputy Clerk. [38]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 28, 1958, At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: Wm. A. White; Reporter: Marie

Zellner; Counsel for Gov't.: Robert J. Jensen, Assistant U. S. Attorney; Counsel for Defendants: James P. Cantillon; Defendants present (on O/R).

Proceedings: For further jury trial. At 10:02 A.M. court convenes. All parties present. Defendants present. The jury and the two alternate jurors are present. Court orders trial proceed.

Stanley Mattoon is called, sworn, and testifies for Gov't.

Gov't Ex. 2, 3, 3-A, and 3-B are marked for ident.

At 10:40 A.M. Court admonishes the jurors not to discuss this cause and declares a recess. At 11 A.M. court reconvenes. All present as before, including the jury and the two alternate jurors.

Witness Mattoon resumes the stand and testifies further.

Gov't Ex. 2, 3-A, and 3-B are received in evidence.

Engia Smith is called, sworn, and testifies for Gov't.

Benjamin Smith is called, sworn, and testifies for Gov't.

John Govlya is called, sworn, and testifies for Gov't.

Gov't Ex. 4 and 5 are marked for ident.

Murray Podalski is called, sworn, and testifies for Gov't.

Gov't Ex. 4 and 5 are received into evidence.

At 12:10 P.M. Court reminds the jurors of the admonition heretofore given and declares a recess. At 2:05 P.M. court reconvenes. All present as before, including the jury and the two alternate jurors. Court orders trial proceed.

Frederick Buol is called, sworn, and testifies for Gov't.

Def'ts' Ex. A and B are marked for ident.

Charles M. Blalock and Byran C. Wheeler, respectively, are called, sworn, and testify for Gov't.

Def'ts' Ex. C is marked for ident.

Leslie B. Dieckman is called, sworn, and testifies for Gov't.

Defendant recalls Byran C. Wheeler, heretofore sworn as a witness for Gov't, and said witness testifies further.

Def'ts' Ex. C is received into evidence.

Gov't Ex. 6-A and 6-B are marked for ident.

It is ordered that Gov't Ex. 6-A and 6-B are received into evidence only as to the question of materiality to be considered by the Court.

At 2:56 P.M. Court reminds the jurors of the admonition heretofore given and declares a recess. At 3:25 P.M. court reconvenes. All counsel, defendants, and the jury and the two alternate jurors are present. Court orders trial proceed.

Counsel stipulate that certain testimony of the defendants from Exhibits 6-A and 6-B will be read to the jury, indicating which of defendant's testimony is being read, and as related to the particular counts of the Indictment.

Gov't rests with the reservation of re-opening the case as to Witness Mattoon and records of Le Madelon Inc. for further testimony.

At 3:50 P.M. Court reminds the jurors of the admonition heretofore given and excuses the jurors. Court remains in session.

Attorney for defendants argues motion for judgment of acquittal as to defendants Anthony Frisone and Nora Frisone as to the respective counts in which defendants are charged.

Court requests that attorney for Gov't argue in reply to defendants' argument to count 6 only, on motion for acquittal.

It Is Ordered that motion for judgment of acquittal is denied as to counts 1, 2, 3, 4, and 5 and said motion is granted as to defendant Anthony Frisone on count 6.

At 4:35 P.M. Court admonishes the jurors not to discuss this cause and Orders cause continued to May 29, 1958, 10 A.M. for further jury trial.

Court adjourns.

JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk. [39]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 29, 1958. At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: W. A. White; Reporter: Marie Zellner; U. S. Att'y., by Assistant U. S. Att'y.: Robert J. Jensen; Counsel for Defendant: James P. Cantillon. Defendants are present (on O/R).

Proceedings: Further Jury Trial:

Court convenes herein at 10:15 a.m. All parties,

including the defendants, the jury and two alternate jurors, are present and Court orders trial proceed. Stanley Mattvan, heretofore sworn, is recalled and testifies further. Govt's exhibit 7 is marked for identification. Defendant's exhibits D and E are marked for identification. Govt's exhibit 8 is marked for identification and 7 and 8 are admitted in evidence. Govt's exhibits 3-C and 3-D are marked for identification and later admitted in evidence. Government rests.

Defendant's exhibits D and E are admitted in evidence. Defendants move again for judgment of acquittal as to remaining counts and said motion is ordered denied. At 11:19 Court admonishes the jury and recesses. At 11:40 a.m. Court reconvenes. Appearances are as before and the jury and alternates as well. Court orders trial proceed. Attorney Cantillon makes opening statement to the jury. Thomas H. Ludlow, Jr. is called, sworn and testifies for the defendants. Defendants' exhibit F is marked for identification. Court reminds the jury of admonition previously given and declares a recess at Noon.

At 2:03 p.m. Court reconvenes, and all parties including the jury and alternates being present, the court orders trial proceed. Court's exhibit No. 1 is marked for identification (stipulation entered into at outset of trial). Leola Gerson is called, sworn and testifies for the defendants. Defendant Nora Mathis Frisone is called, sworn and testifies in her own behalf. Court recesses at 3:10 p.m. after court admonishes the jury.

Court reconvenes at 3:25 p.m. Counsel stipulate to presence of the jury. Court orders trial proceed. Witness Nora M. Frisone resumes the stand. Marcelle Edwards is called, sworn and testifies for the defendants. Anthony Frisone, defendant, is called, sworn and testifies in his own behalf. Court admonishes the jury and recesses at 4:30 p.m. It Is Ordered cause is continued to June 3, 1958 at 10:00 a.m. for further jury trial.

JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk. [40]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: June 3, 1958. At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: L. Cunliffe; Reporter: Leslie L. Richter; U. S. Att'y., by Assistant U. S. Att'y.: Robert J. Jensen, Esq.; Counsel for Defendant: James P. Cantillon, Esq.; Defendants both present (on bond).

Proceedings: Further Jury Trial:

10:23 a.m.—Court convenes and all parties stipulate presence of jury and defendants.

Defendant witnesses Pat Caliendo, George A. Redman, Leo Frisone and Anthony Frisone are called, sworn and testify.

Court admonishes jury.

Defendant rests.

11 a.m.—Court admonishes jury and recesses.

11:15 a.m.—Court reconvenes and all parties stipulate presence of jury.

Defendant attorney moves to reopen case and court orders said motion granted.

Defendant Anthony Frisone, heretofore sworn, is recalled and testifies further in his own behalf.

Defendant's Exhibits G & H are identified and admitted in evidence.

Defendant finally rests.

Plaintiff witness Ann Elkind is called sworn and testifies and Plaintiff's Exhibits 9 & 9-A are identified and admitted in evidence.

11:40 a.m.—Government rests.

11:42 a.m.—Court admonishes jury who leave court room.

Out of hearing of jury, court and counsel confer.

Defendant attorney renews motions to strike Counts 1 to 5, separately and inclusively, for lack of evidence and also for directed verdict of acquittal.

Plaintiff attorney argues in opposition.

Court orders all motions denied.

Court rules on requested jury instructions.

12:10 p.m.—Court recesses.

2:05 p.m.—Court reconvenes with all parties, including jury, present.

U. S. Attorney Jensen makes opening argument from 2:05 p.m., to 2:33 p.m.

Defendant attorney argues from 2:33 p.m. to 3:08 p.m.

3:08 p.m.—Court admonishes jury and recesses.

3:22 p.m.—Court reconvenes and all parties stipulate presence of jury.

U.S. Attorney Jensen makes rebuttal argument from 3:22 p.m. to 3:43 p.m.

3:47 p.m.—Court admonishes jury and recesses until 10 a.m., June 4, 1958.

JOHN A. CHILDRESS,
Clerk,

/s/ By L. CUNLIFFE,
Deputy Clerk. [41]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: June 4, 1958. At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: L. Cunliffe; Reporter: Marie Zellner; U. S. Att'y., by Assistant U. S. Att'y.: Robert J. Jensen, Esq.; Counsel for Defendant: James P. Cantillon & Richard M. Cantillon; Defendants both present (on bond).

Proceedings: Further Jury Trial:

10:07 a.m.—Court convenes with all parties present.

Defendant attorney James P. Cantillon moves to associate his brother Attorney Richard M. Cantillon as counsel because of his unavoidable absence, and court orders said motion granted.

Court instructs jury as to the law applicable until 10:43 a.m.

Court and counsel confer at bar out of hearing of the jury re jury instructions.

Alternate jurors Rebecca Isaacs and Crene K. Dixon are excused, and discharged.

Al Kottner and Bessie M. Seyfriedt are sworn as jury bailiff and matron respectively.

10:57 a.m.—Jury retire to deliberate.

Defendant attorney R. M. Cantillon moves to withhold defendant's Exhibit "C" from the jury. Court denies said motion.

Filed jury instructions as given and refused.

11:05 a.m.—Jury returns to court on order of court and is instructed re election of foreman.

11:06 a.m.—Jury retire to deliberate further.

11:45 a.m. to 1:45 p.m.—Jury go to lunch at Government expenses and then resume deliberations.

5:28 p.m.—Jury return to court room & all parties stipulate their presence.

Court reads note from Jury Foreman to effect that jury cannot agree on a verdict as to any count. Mrs. Rose Levy (Juror No. 10) asks questions re definition of word "Casually." Defendant Attorney makes motion for mistrial. Motion denied. Court and counsel confer at bar out of hearing of jury re dictionary definition of word "Casually." Clerk, upon court's order, prepare written definition from Webster's Unabridged Dictionary of word "Casual," which is agreed to by both counsel and then submitted to jury.

6:05 p.m.—Jury retire to deliberate further.

7:20 p.m.—Jury return to courtroom. Court instructs jury foreman to complete blanks in verdict

forms, which is done. Verdict read that jury find defendant Anthony Frisone guilty as to Count 5, and unable to agree as to Counts 3 & 4, and as to defendant Nora Mathis Frisone, Not Guilty as to Count 2 and could not agree as to Count 1. Court orders matter referred to Probation Officer for pre-sentence report as to Defendant Anthony Frisone as to Count 5 and the matter continued to 2 p.m., June 30, 1958, for hearing on said report & for sentence as to Count 5 and disposition as to Counts 1, 3 & 4. Jury polled as to Guilty verdict Ct. 5.

Defendants to remain on bond already posted in Case No. 26212.

Court denies defendant's motion for dismissal as to Counts 1, 3 & 4.

7:40 p.m.—Court adjourns.

JOHN A. CHILDRESS,
Clerk,

/s/ By L. CUNLIFFE,
Deputy Clerk. [42]

[Title of District Court and Cause.]

JURY VERDICT

We, The Jury, in the above-entitled cause find that the defendant Anthony Frisone is—could not agree—as charged in Count Three of the Indictment, and that he is—could not agree—as charged in Count Four of the Indictment, and that he

is Guilty as charged in Count Five of the Indictment.

/s/ WILLIAM R. ELLERMAN,
Foreman of the Jury.

Dated: This 4th day of June, 1958. [44]

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

Given:

/s/ LEON R. YANKWICH,
Judge. [45]

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right. Nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is my duty, under the law, and my exclusive province, to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by me in these instructions. It would be a violation of your duty to attempt to determine

the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do. [46]

During the course of the trial, I have, at various times, asked questions of certain witnesses, including the defendants. My object in so doing was to bring out, in greater detail, certain facts not yet fully testified to by the particular witness. You are not to infer from the questions I asked that I have any opinion as to the facts to which the questions related. If, from those questions, you have made the inference that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as an opinion, which you are at liberty to disregard in arriving at your own conclusion as to the particular facts or as to the other facts in the case. [47]

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of "Not guilty" of each of the defendants thereto. This duty you should perform uninfluenced by pity for the defendants or any of them, or by passion or prejudice on account of the nature of the charge against them. You are to be governed therefore solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjec-

ture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendants have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. [48]

The offense with which the defendants are charged is Perjury.

In this connection, you are instructed that the indictment on file herein is a mere charge or accusation against the defendants, and is not any evidence of the defendants' guilt and no juror in this case should permit himself to be, to any extent, influenced against the defendants because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendants or any of them be guilty of or not guilty of the offense charged, considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their

degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made at other times, statements inconsistent with his [49] present testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has, in other particulars, sworn to the truth.

In weighing the credibility of the witnesses who have testified during the course of this trial, you may consider whether any of the witnesses have suffered a prior conviction of a felony or an offense involving moral turpitude.

Such conviction you may consider in determining the credibility of the witness. If, notwithstand-

ing such conviction, you are satisfied that the testimony of the witness at the trial is true, you may give it full credit as to any matters to which it relates. [51]

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some fact or facts otherwise known or established by the evidence.

You must not consider as evidence or law any statements, arguments, comments, or suggestions made by counsel during the trial. However, if counsel for either side have admitted, or stipulated to, the existence of any fact, you must consider it proved without further evidence.

You must not consider, for any purpose, any evidence offered and rejected, or which, after being received, has been stricken out by the court. You must decide the case solely upon the evidence before you and the inferences which you may deduce therefrom, as they are stated in these instructions, and upon the law, as given you in these instructions. [52]

There are two kinds of evidence by which the Government may sustain charges laid in an indictment—the one is known as direct and positive; the other, as indirect or circumstantial. Evidence is said to be direct and positive when the witnesses have testified of their own knowledge to matters having a direct bearing upon the issues in the case. Evidence is said to be indirect or circumstantial, on the other hand, when the witnesses testified to matters

having only an indirect or circumstantial relationship to the issues in the case.

While you may show what a man does by direct evidence of eye-witnesses, the only way you can show what he intends and believes or what his plans or purposes are, or were, is by circumstantial evidence.

The law requires that all the circumstances necessary to show guilt must, themselves, be shown by evidence beyond a reasonable doubt; that these circumstances must all be consistent with one another; that they must all be consistent with a defendant's guilt and that they must all be inconsistent with any reasonable theory or hypothesis except that of guilt.

If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty. If it fails to do so, in any one of such particulars, your verdict should be not guilty. [53]

While a defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. And the tests I have given you for determining the credibility of witnesses must be applied to his testimony also. [54]

The indictment in this case, returned by a Grand Jury for the Southern District of California, was originally in six counts, five of which now are be-

fore you. Each is brought under the provisions of Title 18, Section 1621, United States Code.

The pertinent provisions of this statute are as follows:

"Whoever, having taken an oath before a competent tribunal, * * * in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, or depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *" [55]

The elements of the offense of perjury are:

(a) Whether the defendant charged did testify as set forth in the particular count of the Indictment;

(b) Whether the defendant was sworn and under oath at the time of giving his or her testimony;

(c) Whether or not the defendant charged did wilfully and knowingly give false testimony.

In this case, by stipulation of all parties hereto, it has been agreed that each of the defendants was called as a witness in the case of United States v. Anthony Frisone, No. 25580-CD; that each defendant was duly sworn on his or her oath to testify to the truth; and that in said prior proceeding each defendant testified as reported in the transcript of those proceedings, which transcript has been admitted into evidence here.

You are instructed that you must accept the facts

set forth in this stipulation as it was stated and agreed to here in court.

Therefore, there remains of the elements set forth above but one issue: Whether or not the defendant charged wilfully and knowingly gave false testimony in the particular language set forth in each count of the Indictment. [56]

Two primary matters are involved in the determination of the guilt or innocence of the defendants.

First: Is any statement set forth in a particular count of the indictment and attributed to the defendant actually false?

If, after a fair and full consideration of all the evidence in this case, you do not believe beyond a reasonable doubt that any statement attributed to the defendant is false, then, and in that event, you must return a verdict of "Not Guilty." If, however, you are convinced beyond a reasonable doubt that the defendant did give false testimony in the manner alleged in the indictment, then, and in that event, you will have a second issue to determine, namely,

Did the defendant make the false statement wilfully and with the corrupt intent to deceive?

If, after a fair and full consideration of all the evidence in the case, there exists in your minds a reasonable doubt as to whether the false statement was made by the defendant with the wilful and corrupt intent to deceive, then and in that event, it shall be your duty to return a verdict of "Not Guilty."

If, on the other hand, you find that the defendant did make a false statement, as alleged in the indictment, and that the same was made wilfully and with the corrupt intent to deceive, then you shall return a verdict of "Guilty." [57]

You will note from the charge set forth in each count of this Indictment that there are one or more distinct assignments of perjury. The Government need not prove that every one of such statements was perjurious. It is sufficient if it be proved as set forth in these instructions that any one of the statements set forth in a particular count was perjurious, that is, that any one of such statements was knowingly and wilfully, as defined herein, falsely made by the defendant charged while such defendant was testifying under oath. [58]

In a prosecution for perjury it is the duty of the court to first decide whether or not the testimony charged to be false, as set forth in the Indictment, was material to the issues of the case in which said testimony was given.

I have ruled and you are instructed that such testimony was germaine and material to the issues of the case in which it was given.

By making this ruling, I am not deciding any issues of fact which are solely within your province to decide in this case. Nor is my ruling that such evidence was material to be construed as an expression of opinion as to the guilt or the innocence of either of these defendants. [59]

In order to sustain a conviction as to any count of the indictment, the burden is upon the prosecu-

tion to prove beyond a reasonable doubt by the testimony of at least two witnesses, or one witness and corroborating circumstances, that the allegedly false statement was, in fact, false, and that the defendant at the time he made said statement did not believe it to be true, and made the statement wilfully and with the intent to deceive. [60]

While the sufficiency of the corroboration is a question for the jury, it is the general rule that to authorize a conviction for perjury the falsity of the statement alleged to have been made by the defendant must be established either by the testimony of two independent witnesses, or by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused. [61]

Or to put it differently, the Government, as to each of the perjury counts in the Indictment, must establish the falsity of the statement alleged to have been made by the defendant, under oath, by the testimony of two independent witnesses or of one witness and corroborating circumstances; corroborating evidence is sufficient only when the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; you must determine for yourself the credibility and trustworthiness of the corroborative testimony and you must be convinced of its credibility and trustworthiness beyond a reasonable doubt. [62]

To put it negatively:

The uncorroborated testimony of one witness is insufficient to establish the commission of the crime of perjury. [63]

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the Government to establish his guilt by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential part of the law and is binding on you in this case.

If you can reconcile the evidence before you, upon any reasonable hypothesis consistent with a defendant's innocence, you should do so, and in that case find the particular defendant not guilty. [64]

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of a defendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case

which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. [66]

Intent

In every criminal offense there must be concurrence of act and intent. This is especially true in an offense like the present one which requires that the act shall be done knowingly and wilfully.

This intent is a material element of the offense which, like all others, must be proved beyond a reasonable doubt. In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant, as well as the declarations or admissions, if any.

Criminal intent may be implied from the acts, conduct, declarations or admissions of the defendant. Such acts, conduct, declarations and admissions, as shown by the evidence, considered in relation to the charge made, may establish criminal intent beyond a reasonable doubt. [67]

I have already instructed you that in order to support a verdict of "Guilty" as to any one count of the indictment the Government need only prove that the defendant named therein made only one of the statements attributed to him falsely and with the wilful and corrupt intent to deceive.

In regard to this instruction, I now caution you that, as to each of these defendants and as to each count of the indictment, you are not at liberty to

convict them, or either of them, of any of the charges against them, unless there is unanimity of agreement among you as to the particular allegedly false statement and the existence of the requisite intent to deceive as to that statement. [68]

Corroborating evidence, in order to be sufficient, must be substantial but it is not necessary in order to justify a conviction that every detail be re-enumerated by corroborating witnesses. It is sufficient in this regard if two or more witnesses who are believed by you have stated substantially the same events and those events are sufficient, under these instructions as a whole, to make out a case beyond reasonable doubt, or if one such witness has testified to your satisfaction and has been substantially corroborated in each and every material respect by certain, definite and compelling circumstances—satisfactorily established in the whole body of evidence before you. [69]

You will note that the acts charged in the indictment are alleged to have been done "wilfully."

The word "wilfully" means more than knowingly or voluntarily, and includes having an evil motive or a bad purpose.

The use of the word "wilfully" assures that no one will be convicted because of mistake or inadvertence or other innocent reason. [70]

An unqualified statement of that which one does not know to be true, and of which he knows himself to be ignorant, is equivalent under the law of perjury to a statement of that which one knows to be false. [71]

You are instructed that the alleged falsity of defendants' answers complained of in the several perjury counts of the Indictment must have been known to the defendants at the time they testified and as to this element of the case the government must prove and you must find from the evidence beyond a reasonable doubt that the defendants gave the false answers wilfully, that is purposely and with the knowledge of the falsity at the time they testified. A false answer purposely made cannot be said to have been wilfully made if it was made by or through surprise, mistake or inadvertence or if the false answers were made through forgetfulness or through a poor or mistaken recollection of facts.

A defendant charged with perjury, who during the course of the trial of another cause, affirmed the existence of a fact which he did not know to be true and about which he knew himself to be ignorant, is not guilty of perjury if an analysis of his entire testimony relative to such fact creates a reasonable doubt as to whether he intended to qualify his testimony and convey, to those before whom his testimony was given, a belief that some uncertainty existed in his own mind relative to the truth of the fact affirmed. [73]

A defendant is not required to prove a fact beyond a reasonable doubt nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense. [74]

You are instructed that the Indictment sets forth

separate charges of perjury in separate counts and you are to consider each of these counts separately and return a verdict as to each.

You should, of course, consider all the evidence in the case which is relevant and pertinent in arriving at your verdict on each count. [75]

The Government and the defendants are entitled to the individual opinion of each juror on the issues of fact in this case. It is the duty of each of you to consider and weigh all the evidence in the case, and from such evidence to determine, if you can, the question of guilt or innocence of the defendants or any of them. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. If, after careful consideration of all the evidence, your mind is fairly made up, and you are convinced that you are right, it will be your duty to stand by your decision. But each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom; this it is his duty to do. If, after such a full and fair discussion, any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision, and render his verdict according to such final decision. [76]

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

REQUESTED AND REFUSED JURY INSTRUCTIONS

Refused:

/s/ LEON R. YANKWICH,
Judge. [77]

[Title of District Court and Cause.]

GOVERNMENT'S REQUESTED JURY INSTRUCTIONS

(U.S.C., Title 18, Section 1621-Perjury.)

The Government respectfully requests the Court to include the attached special instructions in its charge to the jury, and requests leave to offer such other and additional instructions as may, during the course of the trial, become appropriate.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division,

/s/ ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Div.
Attorneys for Plaintiff,
United States of America.

Government's Requested Instruction No. 1.

The Indictment in this case, returned by a Grand Jury for the Southern District of California, is in six counts, each of which is brought under the provisions of Title 18, Section 1621, United States Code.

The pertinent provisions of this statute are as follows:

"Whoever, having taken an oath before a competent tribunal, * * * in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, or depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, * * *" [79]

Government's Requested Instruction No. 2.

In a prosecution for perjury it is the duty of the court to first decide whether or not the testimony charged to be false, as set forth in the Indictment, was material to the issues of the case in which said testimony was given.

I have ruled and you are instructed that such testimony was germaine and material to the issues of the case in which it was given.

By making this ruling, I am not deciding any issues of fact which are solely within your province to decide in this case. Nor is my ruling that such evidence was material to be construed as an expression of opinion as to the guilt or the innocence of either of these defendants. [80]

Government's Requested Instruction No. 3.

The elements of the offense of perjury are:

(a) Whether the defendant charged did testify as set forth in the particular count of the Indictment;

(b) Whether the defendant was sworn and under oath at the time of giving his or her testimony;

(c) Whether or not the defendant charged did wilfully and knowingly give false testimony.

In this case, by stipulation of all parties hereto, it has been agreed that each of the defendants was called as a witness in the case of United States v. Anthony Frisone, No. 25580-CD; that each defendant was duly sworn on his or her oath to testify to the truth; and that in said prior proceeding each defendant testified as reported in the transcript of those proceedings, which transcript has been admitted into evidence here.

You are instructed that you must accept the facts set forth in this stipulation as it was stated and agreed to here in court.

Therefore, there remains of the elements set forth above but one issue: Whether or not the defendant charged wilfully and knowingly gave false testimony in the particular language set forth in each count of the Indictment. [81]

Government's Requested Instruction No. 4.

"You are instructed that the alleged falsity of defendant's answers complained of in the several perjury counts of the Indictment must have been known to the defendant at the time he testified and as to this element of the case the Government must

prove and you must find from the evidence beyond a reasonable doubt that the defendant gave the false answers wilfully, that is purposely and with the knowledge of the falsity at the time he testified. A false answer purposely made cannot be said to have been wilfully made if it was made by or through surprise, mistake or inadvertence or if the false answers were made through forgetfulness or through a poor or mistaken recollection of facts."

Taken from the charge to the jury in United States v. Harold Roland Christoffel, 171 F. 2d 1004 (1948). The Supreme Court reversed and remanded the case, holding that the Government had failed properly to prove that a quorum of the Committee on Education and Labor of the House of Representatives was present when Christoffel was sworn and testified. The Opinion of the Supreme Court is reported at 330 U.S. 84 (1949). It is clear that the reversal was not upon the ground of error in the instruction but rather upon finding of failure of proof. The instruction given was repeated at the retrial of the case in the District Court for the District of Columbia. [82]

Government's Requested Instruction No. 5
(Statements Made in Absence of Knowledge)

An unqualified statement of that which one does not know to be true, and of which he knows himself to be ignorant, is equivalent under the law of perjury to a statement of that which one knows to be false.

Perjury, Key 37(2); Caljic, Instruction No. 762.

Government's Requested Instruction No. 6.
(Perjurer Need Not Know Materiality)

It is not a defense to a prosecution for perjury that the accused did not know the materialty of the false statement, if any, made by him or that it did not in fact affect the proceeding in or for which it was made. If it was in fact material and might have been used to affect such proceedings, the requirement of the law as to materiality is met.

Perjury, Key 37(2); People v. Darcy (1943), Calif., 139 Pac. 2d 118 (Perjury); Wattenmaker v. United States, 34 F. 2d 741 (3 Cir.) (false swearing before referee); Travis v. United States, 123 F. 2d 268 (10 Cir.) (perjury before referee); Ulmer v. United States, 219 Fed. 641 (6 Cir.), cert. den. 238 U.S. 638 (perjury before referee). [84]

Government's Requested Instruction No. 7.

"I further instruct you that as this is a prosecution for perjury, the Government, as to each of the perjury counts in the Indictment, must establish the falsity of the statement alleged to have been made by the defendant, under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances; corroborating evidence is sufficient only when the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; you must determine for yourself the credibility and trustworthiness of the corroborative testimony and you must be convinced of its credibility and trustworthiness beyond a reasonable doubt.

"Corroborating testimony in that regard must be of a trustworthy character and not merely corroboration of slight particulars * * *"

Taken from the language of United States v. Harold Roland Christoffel re-trial in the District of Columbia. Substantially the same instruction was given at the original trial of the case reported first in 171 F. 2d 1004 (1948); reversed upon grounds that it did not attack the instruction, at 330 U.S. 84 (1949). [85]

Government's Requested Instruction No. 8.

Corroborating evidence, in order to be sufficient, must be substantial but it is not necessary in order to justify a conviction that every detail be reenumerated by corroborating witnesses. It is sufficient in this regard if two or more witnesses who are believed by you have stated substantially the same events and those events are sufficient, under these instructions as a whole, to make out a case beyond reasonable doubt, or if one such witness has testified to your satisfaction and has been substantially corroborated in each and every material respect by certain, definite and compelling circumstances—satisfactorily established in the whole body of evidence before you.

United States v. Slutzky, 79 F. 2d 504; Wiler v. United States, 323 U. S. 606; Hart v. United States, 131 F. 2d 59. [86]

Government's Requested Instruction No. 9.
(Two classes of Evidence—Circumstantial and Direct)

(Both on the Same Level)

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct evidence, which is the direct testimony of any eye witness to a transaction. The other is circumstantial evidence, which includes all evidence other than that of an eye witness. Such evidence may consist of any acts, declarations, or circumstances admitted in evidence tending to prove the crime charged or tending to connect a defendant with the commission of the crime charged.

The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction. In other words, circumstantial evidence is on no different or lower plane than other forms of evidence. The law only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

If, upon consideration of the whole case, you are satisfied to a moral certainty, and beyond a reasonable doubt, of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence.

(See: 1831 & 1832 Calif. Code of Civil Proc. for definition of Direct and Indirect Evidence); Cyc. of Fed. Proc., 2nd Ed., Vol. 9, Sec. 4429 (Circumstantial Evidence); United States v. Valenti, 134 F. 2d 362 (5 Cir., 1943) (Income tax matter) (Stat-

ing circumstantial evidence is on no different or lower plane than any other form of evidence);

Also see: [87] United States v. Becher, 62 F. 2d 1007, page 1010 (2 Cir.); United States v. Frankel, 65 F. 2d 285 (2 Cir.), at pages 288 and 289, cert. den. 290 U.S. 682 (a charge that circumstantial evidence may at times be better than direct evidence held proper); Criminal Law, Key 784 (Circumstantial Evidence, Instructions) Hickory v. United States, 151 U.S. 303 (It is not reversible error for the court to say in its charge that persons who assert that it is cruel and criminal to convict upon circumstantial evidence are fools or knaves or sympathetic to criminals.). [88]

Government's Requested Instruction No. 10.
(All Charges of Perjury Need Not Be Proved)

When the Indictment charges in the one count that the defendant made more than one false statement, to support a conviction the proof need show that he made only one of such statements, provided that as to that one statement the proof is adequate under the law and shows that every essential element of the crime of perjury, as I have defined those elements, was present in the making of such statement.

In other words, the prosecution need not prove that all of the alleged testimony was false, but it must prove beyond a reasonable doubt that at least one of such statements was false.

Perjury, Key 37 (3); Caljic, Instruction No. 765; Seymour v. United States, 77 F. 2d 577 (8

Cir.), at page 581 (Perjury before Senate Investigating Committee); People v. Pustau, Calif. 39 Cal. App. 2d 407, 103 Pac. 2d 224 (Perjury); People v. Mizer, 37 Cal. App. 2d 148, 99 Pac. 2d 333 (Perjury); Warszower v. United States, 312 U.S. 342 (Prosecution of false statements in obtaining passport). [89]

Government's Requested Instruction No. 11.
(Criminal Intent)

In every crime or public offense there must exist a union or joint operation of act and intent. To constitute a criminal intent, it is merely necessary that a person intended to do an act which, if committed, will constitute a crime. This does not mean that one must intend all the consequences of his conduct or that he must know that such conduct is unlawful to be guilty of a public offense such as is charged in this case.

When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive on his part.

(Criminal Law, Key 772 (5), Intent, etc.)

You are instructed that criminal intent must be proved beyond a reasonable doubt, but since it is impossible to enter the mind of the accused to find the intent at the date of the alleged offense, it may be established by circumstances, conduct both before, at, and subsequent to the acts charged.

The defendant's act and conduct considered in

their relation to the charge made, may establish satisfactorily a criminal intent notwithstanding the declaration of the defendant that no such intent was present in his mind. The law presumes that every man intends the natural and ordinary consequences of his acts.

(Criminal Law, Key 312 (Intent))

Wrongful acts, knowingly, wilfully and deliberately committed, cannot be justified on the ground of innocent intent. The color of the act, done with the knowledge of its natural or necessary results, determines the complexion of the intent.

Intention, as I have advised, may be proved by circumstantial evidence. Indeed, it rarely can be proved by any other means; it is something that no man can determine by looking into the mind of another.

You should examine all of the evidence, all the facts and circumstances which tend to shed light on what the intent may or may not have been as of the time charged in the Indictment.

Cyc. of Fed. Proc., 2nd Ed., Vol. 9, Sec. 4310; Criminal Law, Key 772 and 772 (5) (Elements of Offense and (5) Intent, etc.); United States v. Fore, 38 F. Supp. 140 D.C.Calif. (1941) (Homicide—insanity) (Intent may be shown by circumstances, conduct, etc.); Eastman v. United States, 153 Fed. 2d 80, page 83; Criminal Law, Key 568 (also see Pocket Part) (Elements of offenses in general) (Intent may be shown by inference and circumstantial evidence); Johnson v. United States, 260

Fed. 783 (9 Cir.), page 785; Aiken v. United States, 108 F. 2d 182 (4 Cir.) (Fraudulent intent a mental element often not provable from direct evidence); Nassan v. United States, 126 F. 2d 613 (4 Cir.) (Intent proved from all circumstances); Stunz v. United States, 27 F. 2d 575 (8 Cir.); Caljic, Instruction No. 71. [90]

[Title of District Court and Cause.]

GOVERNMENT'S REQUESTED ADDITIONAL JURY INSTRUCTIONS

(U.S.C., Title 18, § 1621—Perjury)

The Government respectfully requests the Court to include the additional attached special instructions in its charge to the jury, and requests leave to offer such other and additional instructions as may, during the course of the trial, become appropriate.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,
LLOYD F. DUNN,
Assistant U. S. Attorney, Chief, Criminal Division,

/s/ ROBERT JOHN JENSEN,
Assistant U.S. Attorney, Assistant Chief, Criminal Division,
Attorneys for Plaintiff,
United States of America.

Government's Requested Instruction No. 12

You are instructed that the Indictment sets forth separate charges of perjury in separate counts and you are to consider each of these counts separately and return a verdict as to each.

You should, of course, consider all the evidence in the case which is relevant and pertinent in arriving at your verdict on each count. [92]

Government Requested Instruction No. 13

You will note from the charge set forth in each count of this Indictment that there are one or more distinct assignments of perjury. The Government need not prove that every one of such statements was perjurious. It is sufficient if it be proved as set forth in these instructions that any one of the statements set forth in a particular count was perjurious, that is, that any one of such statements was knowingly and wilfully, as defined herein, falsely made by the defendant charged while such defendant was testifying under oath. [93]

Government's Requested Instruction No. 14
(Province of the Jury)

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the Indictment and the denial made by the "Not-Guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evi-

dence, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

DEFENDANTS' REQUESTED INSTRUCTIONS

Request for Instructions

Come now the defendants, Anthony Frisone and Nora Mathis Frisone, and respectfully request the Court in its charge to the jury to include the following instructions; and leave is requested to offer such additional instructions as may, during the course of the trial, become appropriate.

CANTILLON & CANTILLON,
JAMES P. CANTILLON,
/s/ By R. MICHAEL CANTILLON,
Attorneys for Defendants. [96]

Defendants' Requested Instruction No. 1

It is the function of you, the jury, to try the issues of fact that are presented by the allegations in the indictment filed in this Court and the defendants' pleas of "Not Guilty".

You must not suffer yourselves to be biased against the defendants because of the fact that they have been arrested for the offense here charged or because an indictment has been returned against them, or because they have been brought before the Court to stand trial. None of these facts is evi-

dence of their guilt, and you are not permitted to infer or to speculate from any or all of them that they are more likely to be guilty than innocent. On the other hand, the defendants' pleas of "Not Guilty" are facts which raise the presumption of innocence. [97]

Defendants' Requested Instruction No. 2

The Court instructs the Jury:

A presumption of innocence surrounds a defendant in a criminal prosecution such as this one and continues to operate until it is overcome by proof of guilt beyond a reasonable doubt.

The theory of the doctrine of the presumption of innocence lies not in a design to protect the guilty, but in a zeal to prevent the conviction of the innocent.

All of the evidence in a criminal case, whether introduced by the prosecution or by the defendant, should be examined by you, the jury, in the light of the presumption of innocence, and whenever it is reasonable to do so, it is your duty as trial jurors to place an innocent interpretation upon the acts and conduct of the accused.

U. S. v. Fleishman, 339 U. S. 349. [98]

Defendants' Requested Instruction No. 3

A "reasonable doubt" exists when, after the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. [99]

Defendants' Requested Instruction No. 3A

If the evidence in this case is susceptible of two constructions or interpretations each of which appears to you to be reasonable, and one of which points to the guilt of the defendant and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendants' innocence and reject that which points to his guilt. [100]

Defendants' Requested Instruction No. 4

From the beginning of the trial until the end, the Government has the burden of establishing beyond a reasonable doubt every fact essential to the conviction of the defendants; the defendants have no burden to sustain; it's enough that their evidence, taken with the Government's, raises a reasonable doubt as to their guilt, in which case they must be acquitted.

Agnew v. United States, 165 U. S. 36, 17 S. Ct. 235, 41 L. Ed. 624;

United States vs. Fleishman, 339 U. S. 349. [101]

Defendants' Requested Instruction No. 5

Any verdict that you shall return must reflect the individual opinion of each juror. The defendants are entitled to the individual opinion of each and every member of the jury on the proposition of their guilt or innocence, and therefore, the verdict that you return must reflect the individual and conscientious opinion of each of you.

Although it is in the interests of both the defendants and the government that a verdict be returned,

I caution you that it would be a violation of your oath as jurors to change any conscientious opinion of your own on the subject of the guilt or innocence of these defendants solely for the purpose of returning a verdict, or for the reason that a majority of your fellow jurors may hold a contrary opinion. It would also be a violation of your oath to compromise any conscientious determination you have reached solely because of the number of counts in the indictment. [102]

Defendants' Requested Instruction No. 6

Whenever during the course of my instructions to you I use the masculine singular, I do so for convenience only, and you, the jury, must apply these instructions to the female defendant and witnesses as well, unless, of course, the instruction in which I use the masculine singular has application only to a particular count of the indictment by which Anthony Frisone is charged, or singles out a particular male witness. [103]

Defendants' Requested Instruction No. 7

You are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence; by the manner of the witness on the stand, the degree of intelligence exhibited by him, and the manner in which he testifies; by the character of his testimony; by evidence showing his motives, or bias, or prejudice, against one of the parties; by evidence that on some former occasion he made a statement or statements incon-

sistent with his present testimony, or by evidence adversely affecting the character of the witness for truth, honesty, or integrity. [104]

Defendants' Requested Instruction No. 8

In weighing the credibility of the witnesses who have testified during the course of this trial, you may consider whether any of the witnesses have suffered a prior conviction of a felony involving moral turpitude.

The witness, Norma Jean Scholes, admitted from the witness stand that she had, before the commencement of this trial, been convicted of a violation of the Mann Act. I now charge you that a violation of the Mann Act involves moral turpitude. [105]

Defendants' Requested Instruction No. 9

In this case, you must decide separately the question of the innocence or guilt of each of the two defendants.

Nora Mathis Frisone is entitled that you give individual consideration to her case without regard to the charges against her husband and co-defendant, Anthony Frisone. She is also entitled that you, the jury, consider separately each of the counts of the indictment which constitute a charge against her.

Of course, the same holds true for the defendant Anthony Frisone, and he likewise is entitled that you consider the charges against him separately and without regard to the charges against his wife and co-defendant, Nora Mathis Frisone. [106]

Defendants' Requested Instruction No. 10

By virtue of the stipulation entered into between the Government and the defendants at the commencement of this trial, there remain only two primary issues to be resolved by you in determining the guilt or innocence of these defendants. These questions to be resolved by you must be applied to each count of the indictment separately.

First: Is any statement set forth in the indictment and attributed to the defendant actually false?

If, after a fair and full consideration of all the evidence in this case, you do not believe beyond a reasonable doubt that any statement attributed to the defendant is false, then, and in that event, you must return a verdict of "Not Guilty". If, however, you are convinced beyond a reasonable doubt that the defendant did give false testimony in the manner alleged in the indictment, then, and in that event, you will have a second issue to determine, namely:

Did the defendant make the false statement wilfully and with the corrupt intent to deceive?

If, after a fair and full consideration of all the evidence in the case, there exists in your minds a reasonable doubt as to whether the false statement was made by the defendant with the wilful and corrupt intent to deceive, then, and in that event, it shall be your duty to return a verdict of "Not Guilty".

If, on the other hand, you find that the defendant did make a false statement, as alleged in the

indictment, and that the same was made wilfully and with the corrupt intent to deceive, then you shall return a verdict of "Guilty", provided, however, that each of you must keep in mind throughout your [107] deliberations that the entire proof must carry the convincing force required by law to support a verdict of guilt before such a verdict may be returned. [108]

Defendants' Requested Instruction No. 11

In order to sustain a conviction as to any count of the indictment, the burden is upon the prosecution to prove beyond a reasonable doubt by the testimony of at least two witnesses, or one witness and corroborating circumstances, that the allegedly false statement was, in fact, false, and that the defendant at the time he made said statement did not believe it to be true, and made the statement wilfully and with the intent to deceive.

United States vs. Hall, 44 Fed. 864;

Bohen vs. United States, 123 Fed. (2d) 791. [109]

Defendants' Requested Instruction No. 12

The uncorroborated testimony of one witness is insufficient to establish the commission of the crime of perjury. [110]

Defendants' Requested Instruction No. 13

Proof by the prosecution that a defendant charged with perjury gave false testimony while under oath does not raise a presumption or inference of guilt nor does such evidence alone rebut the presumption of innocence.

The giving of false testimony is only one element of the crime of perjury, and a defendant so charged is entitled to a verdict of "Not Guilty" unless the presumption that such false testimony was given innocently is rebutted by evidence that establishes beyond a reasonable doubt that such testimony was given wilfully and with the corrupt intent to deceive. [111]

Defendants' Requested Instruction No. 14

A defendant charged with perjury, who during the course of the trial of another cause affirmed the existence of a fact which he did not know to be true and about which he knew himself to be ignorant, is not guilty of perjury if an analysis of his entire testimony relative to such fact creates a reasonable doubt as to whether he intended to qualify his testimony and convey, to those before whom his testimony was given, a belief that some uncertainty existed in his own mind relative to the truth of the fact affirmed.

(To be given if Government's Requested instruction No. 5 is given.) [112]

Defendants' Requested Instruction No. 15

I have already instructed you that in order to support a verdict of "Guilty" as to any one count of the indictment, the Government need only prove that the defendant named therein made only one of the statements attributed to him falsely and with the wilful and corrupt intent to deceive.

In regard to this instruction, I now caution you that, as to each of these defendants and as to each

count of the indictment, you are not at liberty to convict them, or either of them, of any of the charges against them, unless there is unanimity of agreement among you as to the particular allegedly false statement and the existence of the requisite intent to deceive as to that statement.

To put the matter another way, let me say this —and bear in mind that it has application to each defendant and to each count of the indictment:

Before you may find either of these defendants guilty as charged in any count of the indictment, all of you must be convinced, and beyond a reasonable doubt, that at least one particular statement in the count under consideration is false and that the false statement was made wilfully and with the intent to deceive. [113]

Defendants' Requested Instruction No. 16

The law recognizes that failure of recollection is a common experience and innocent misrecollection is not uncommon. It is also a fact that two persons witnessing an event often will see or hear it differently and thus recall it, in many of its details, at variance with one another. Therefore, if you find that either of the defendants here on trial gave false testimony as alleged in the indictment, you should weigh and consider all of the evidence introduced during the trial touching upon the subject of such testimony, in an effort to determine whether the falsehood was wilfully made and with the intent to deceive, or whether it was made through an honest mistake in its belief, or as a result of inno-

cent misrecollection, and if, after such consideration, there exists in your mind a reasonable doubt as to whether the defendants, or either of them, wilfully and corruptly intended to deceive at the time such testimony was given, then it is your duty to resolve that doubt in favor of the defendants, or defendant as the case may be, and return a verdict of "Not Guilty". [114]

Defendants' Requested Instruction No. 17

Upon the trial of a person charged with the commission of perjury who, it is alleged, testified falsely during the course of another trial, you, the jury, should weigh and consider the probability, or lack of probability, that the allegedly false testimony would have influenced the tribunal before which it was given.

That is to say, that although I have found, as a matter of law, that the testimony set forth in the indictment was material to the proceedings in which it was given, nevertheless, and because there are varying degrees of materiality and relevancy, you, the jury, should consider the extent of the likelihood that the false testimony would have influenced the tribunal before which it was given as bearing upon the existence or non-existence of a motive to testify falsely. [115]

Defendants' Requested Instruction No. 18

A defendant in a criminal prosecution is a competent witness to testify in his own behalf. A defendant's testimony is to be weighed and considered by the same standard that you use to weigh

and consider the testimony of any other witness. You should not disregard a defendant's testimony solely because he is a defendant. A defendant is presumed to speak the truth, and the testimony of the defendant is sufficient alone to establish any fact to which you believe he truthfully testified.

[Endorsed]: Defendants' Requested Instructions Filed June 2, 1958.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL OF DEFENDANT ANTHONY FRISONE

Comes now the defendant Anthony Frisone, having heretofore been convicted of the crime of perjury as alleged in count five of the indictment herein, and moves the Court for a new trial in accordance with the provisions of Rule 33 of the Federal Rules of Criminal Procedure.

The motion of defendant is based upon the following grounds:

1. That the trial court committed substantial, prejudicial error when it failed to admit relevant and pertinent evidence offered by the defendant Anthony Frisone of his medical history concerning mental illness. That such evidence was germane to a determination of the existence or nonexistence of a wilful and corrupt specific intent to falsify on the occasion when an admittedly false statement was made by the defendant.

2. That the trial court committed substantial and [117] prejudicial error when it misdirected the jury and instructed them that they could convict this defendant upon the finding that any one of the statements attributed to the defendant by count five of the indictment was perjuriously made.

Dated: June 11, 1958.

CANTILLON & CANTILLON,
/s/ By R. MICHAEL CANTILLON,
Attorneys for Defendant.

Proof of Service by Mail Attached.

[Endorsed]: Filed June 11, 1958.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: June 30, 1958. At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: L. Cunliffe; Reporter: Marie Zellner; U. S. Attorney, by Assistant U. S. Attorney: Robert J. Jensen, Esq.; Counsel for Defendant: James P. Cantillon, Esq. Defendants both present (on bond).

Proceedings:

1. For hearing on motion of Defendant Anthony Frisone for new trial: Both sides argue.
It Is Ordered that said motion be denied.

2. For hearing on report of Probation Officer as to defendant Anthony Frisone and for sentence

upon a verdict of guilty as to Count 5 and for disposition of Counts 3 & 4:

It Is Ordered that the defendant Anthony Frisone be committed to the custody of the Attorney General for imprisonment for a period of eighteen (18) months as to Count 5, and upon the motion of the U. S. Attorney, it is further ordered that Counts 3 & 4 hereby and are dismissed.

It Is Further Ordered that execution of sentence on Count 5 be suspended until 5 p.m., July 2, 1958, at which time defendant Anthony Frisone is to surrender to the U. S. Marshal, and until that time, he is allowed to remain on present bail.

It Is Further Ordered that Count 1 as to the defendant Nora Mathis Frisone hereby and is dismissed.

JOHN A. CHILDRESS,
Clerk,

/s/ By L. CUNLIFFE,
Deputy Clerk. [120]

[Title of District Court and Cause.]

MEMORANDUM AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

Defendant Anthony Frisone herewith presents his Memorandum and Points and Authorities in support of his motion for a new trial.

Statement of Facts

An indictment was returned herein charging de-

fendant with the commission of perjury in four counts (see Counts 2-6 of Indictment). Defendant was acquitted of the charges contained in Count 6, and a mistrial was declared as a result of the inability of the jury to reach a verdict as to Counts 3 and 4. Defendant was convicted of the charges contained in Count 5.

Count 5 in substance charges that defendant testified that he knew Nora Mathis Frisone, the co-defendant, only casually in the month of December, 1954, when in fact he had been living with her as man and wife since September, 1954. [121]

The defendant admitted making the false statement attributed to him by the allegations of the indictment, but stated that at the time he made the false statement, he did so in good faith with the honest belief that he was telling the truth.

To support his contention that the admitted falsehood was the result of an honestly mistaken belief in its truth, defendant related how, prior to the giving of such testimony, he talked with several persons in an effort to determine exactly the date of his first intimate association with the co-defendant, and how he attempted to reconstruct the years 1954 and 1955 in his own mind.

The defendant further attempted to prove that in the past he had suffered from a mental illness which affected his memory and ability of recollection. The Court rejected this offered testimony during the course of the following proceedings:

"Cantillon: Now, Mr. Frisone, I am going to

ask you if you have ever suffered any mental illness in the past.

U. S. Atty.: I will object to that as being improper and ask him to lay more foundation.

Court: I cannot see any bearing on the issue here.

Cantillon: Well, I am going to offer to prove, your Honor, that Mr. Frisone was treated by the Marine Corps.

Court: No, we don't want any offer of proof—there is no plea of insanity here.

Cantillon: It is not based upon that. It is based upon the defendant's honest belief and recollection or failure of recollection.

Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal Court. [122]

Cantillon: Well, I think I have stated my point.

The Court: All right.

Cantillon: Nothing further.

Court: Ladies and gentlemen, you are not to assume from the conversation that we had that any such condition exists. I did not know what counsel was offering, and it was merely offered to prove certain things which have no bearing upon the issues in this case."

Note: The foregoing recitation of the record of the within proceedings is based upon an oral transcription of the trial court reporter's notes by another reporter whose statements were taken down in shorthand over the telephone by defense counsel's secretary.

Argument and Points and Authorities

The United States Attorney in his Memorandum in Opposition to Defendant's Motion for a New Trial inaccurately states that the foregoing proceedings and the rejection of the aforesaid evidence occurred during "sur-rebuttal". In fact, the foregoing proceedings occurred during the defense. The defense offered no sur-rebuttal evidence.

The materiality of the foregoing offered evidence is patent, and its significance to the count upon which the defendant was convicted is pointed up by the fact that as to all of the other charges against him, the defendant testified he had spoken the truth.

The verdict of the jury and their statement that they were unable to agree and request for further instructions indicate a substantial conflict in the evidence and its interpretation.

The mental state of a defendant charged with the commission of perjury is always relevant. An essential element [123] of the crime of perjury is the giving of false testimony by a defendant:

"* * * which he does not believe to be true * * *"

18 U.S.C.A. 1621; U.S. vs. Rose, (CA 3 D) 215 Fed. 2nd 617; Wharton's Criminal Law & Procedure, Vol. 3 P. 650.

Offers of proof have long been recognized in the Federal Courts as both appropriate and a proper method of establishing the admissibility of evidence. (23 C.J.S., Criminal Law, Section 1029 and cases cited therein.)

A court is never justified in refusing a defendant

the opportunity to make an offer of proof except where every conceivable answer to the question would be inadmissible.

D- Aquino vs. U.S., (C.A. 9th) 192 Fed. 2d 338.

Where the trial judge refuses the defendant an opportunity to establish the admissibility of evidence by an offer of proof, it is reversible error if any conceivable answer would have been relevant to the facts in issue.

Heimann vs. City of L.A., 30 Cal. 2d 746; People vs. McGee, 31 Cal. 2d 229.

Respectfully submitted,

CANTILLON & CANTILLON,
/s/ By JAMES P. CANTILLON,
Attorneys for Defendants. [124]

[Endorsed]: Filed June 30, 1958.

[Title of District Court and Cause.]

OPPOSITION TO MOTION FOR NEW TRIAL

Plaintiff opposes the Motion for New Trial of the defendant Anthony Frisone upon the following grounds:

1. The trial court did not commit error in its rulings on evidence and in the Instructions given.

2. No prejudice to said defendant resulted from the court's rulings on evidence or its Instructions.

3. No proper exception was taken of the Instruction now asserted as error.

These grounds are supported by the record in this case and the attached Points and Authorities.

Points and Authorities

The proposed testimony on mental illness was offered in sub-rebuttal where the evidence in rebuttal had not gone to any such issue or any related issue and defendant did not offer nor ask to re-open his defense in chief. Furthermore, the defendant had twice before been on the stand without broaching such subject. Under these circumstances it is not an abuse of discretion for the trial court to refuse to admit such evidence.

Wigmore on Evidence, § 1874 of Vol. VI, Third Edition; Corpus Juris Secundum, Vol. 88, § 103 of Trials, p. 217; Chateaugay Ore & Iron Co. v. Blake (Sup. Ct. 1892), 144 U.S. 476, at 484-485; O. W. Kerr Co. v. Corry (7 Cir. 1914), 211 Fed. 647.

As to the proffered testimony, there was no foundation as to time or place in relation to the issues of this case. Such evidence had therefore no probative value.

The defendant failed to except with particularity or at all to the Instructions now complained of, and such Instruction, as given, was a proper statement of the law.

Rule 30, F.R.C.P., U.S.C.; Benatur v. United States (9 Cir. 1954), 209 F.2d 734, at 744; cert. den. 347 U.S. 974; Las Vegas Merchant Plumbers v. United States (9 Cir. 1954), 210 F.2d 732, at 744, 745.

Seymour v. United States (8 Cir.), 77 F.2d 577,

at 581; People v. Pustau (Calif.), 103 Pac. 2d 224, at 228. [126]

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,
LLOYD F. DUNN,
Assistant U. S. Attorney, Chief, Criminal Division,
/s/ ROBERT JOHN JENSEN,
Assistant U.S. Attorney, Assistant Chief, Criminal Division,
Attorneys for Plaintiff. [127]

Affidavit of Service by Mail Attached. [128]

[Endorsed]: Filed June 26, 1958.

United States District Court for the Southern District of California, Central Division

No. 26307-Criminal Central

UNITED STATES OF AMERICA

vs.

ANTHONY FRISONE

JUDGMENT AND COMMITMENT

On this 30th day of June, 1958 came the attorney for the government and the defendant appeared in person and by his counsel, James P. Cantillon, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and upon a jury

verdict of Guilty as to Count 5 of the Indictment of the offense of on or about March 26, 1957, during the course of trial in Criminal Case No. 25580-CD, defendant did knowingly, wilfully and contrary to oath taken as witness in said trial, testify falsely in respect to material matters of said case in that he testified as to his knowing his wife Nora Mathis Frisone in December of 1954 only casually whereas in truth and in fact said defendant was living with said Nora Mathis Frisone from September 17, 1954 to the end of that year as charged in Count 5 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months, and it is Further Ordered that execution of said sentence be suspended to 5 p.m., July 2, 1958, at which time defendant is to surrender to the custody of the U. S. Marshal, and he is allowed to remain on present bond until that time, and

It Is Adjudged that, upon motion of the U. S. Attorney, Counts 3 & 4 of the Indictment as to defendant Anthony Frisone, hereby and are dismissed.

It Is Ordered that the Clerk deliver a certified

copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

[Seal] /s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed June 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Anthony Frisone, 634 South Gramercy Place, Los Angeles, California.

Name and address of Appellant's attorney: Cantillon & Cantillon, by James P. Cantillon, 9441 Wilshire Boulevard, Beverly Hills, California.

Offense: Violation of Title 18, U.S.C.A. Section 1621.

The appellant was found guilty upon the verdict of a jury and judgment for conviction thereupon was entered. Appellant was sentenced to serve eighteen months in the Federal Penitentiary.

Appellant is now on bail pending appeal.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: July 2, 1958.

/s/ ANTHONY FRISONE. [131]

[Endorsed]: Filed July 2, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 141, inclusive, containing the original:

Indictment.

Minute Order 12/2/57.

Minute Order 12/2/57.

Minute Order 12/17/57.

Notice of Motion and Motion for Trial Setting.

Minute Order 2/7/58.

Trial Memorandum.

Minute Order 5/27/58.

Minute Order 5/28/58.

Minute Order 5/29/58.

Minute Order 6/3/58.

Minute Order 6/4/58.

Answer to Question of the Jury.

Jury Verdict.

Court's Instructions to the Jury.

Requested and Refused Jury Instructions.

Motion for New Trial.

Minute Order 6/30/58.

Memorandum of Points and Authorities in support of Motion for New Trial.

Opposition to Motion for New Trial.

Judgment.

Minute Order 7/2/58.

Notice of Appeal.

Notice of Designation of Clerk's and Reporter's Records on Appeal.

Application to extend time for filing of record and docketing appeal.

Order extending time to file and docket record on appeal.

Notice of Designation of further record on appeal.

Second Notice of Designation of further record on appeal.

B. Government's Exhibits 1 to 9-A, inclusive.

Defendant's Exhibits A to H, inclusive.

Court's Exhibit No. 1.

C. Three volumes of Reporter's Official Transcript of Proceedings had on: May 27 and 28, 1958; May 29, 1958, June 3, 1958, June 4, 1958 and June 20, 1958.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: October 31, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

In the United States District Court, Southern District of California, Central Division

No. 26307-Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

ANTHONY FRISONE and NORA MATHIS FRISONE, Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, May 27, 1958

Honorable Leon R. Yankwich, Judge Presiding, and a Jury. [14]

* * * * *

INGA CONSTANCE SMITH

called as a witness by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: Your name, please?

The Witness: Mrs. Ben Smith.

The Clerk: Your given name.

The Witness: Inga Constance Smith. [151]

Direct Examination

Q. (By Mr. Jensen): Mrs. Smith, we have a large room here, and you have somewhat of a soft voice. Would you keep it up, so that we can all hear you? A. I will. I'll try.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Inga Constance Smith.)

Q. Thank you. That is fine. Mrs. Smith, where do you reside?

A. At 7538 Lexington Avenue in Hollywood.

Q. Are you married? A. Yes.

Q. And does your husband reside with you?

A. Yes.

Q. How long have you resided there?

A. Well, to the best of my knowledge, I would say about seven or eight years, where we live right now.

Q. Do you have some rental property at that location, or approximately at that location?

A. Yes, we do.

Q. How many units do you have?

A. We have three.

Q. And would you tell us, briefly, what the nature of the units are?

A. Well, we have an adjoining apartment to ours, furnished adjoining apartment. [152]

Q. To what place?

A. To ours, to where we are living now.

Q. Fine. And the other two units?

A. Are a little cottage in the rear, and a garage apartment in the rear.

Q. And the adjoining apartment to yours, does it have a separate address? A. Yes.

Q. Would you give us the number of that, please? A. 7540 Lexington.

Q. That is 7540 Lexington?

A. That's right.

Q. In Hollywood? A. Yes.

(Testimony of Inga Constance Smith.)

Q. I direct your attention to the defendants, Mr. and Mrs. Frisone, who are at counsel table to my left. Would you tell us, Mrs. Smith, whether they were at any time tenants of yours? A. Yes.

Q. Were they tenants together? I mean by that, did they occupy the same premises? A. Yes.

Q. And which premises did they occupy?

A. 7540.

Q. The adjoining apartment? [153]

A. The adjoining apartment to ours.

Q. And when did they occupy those premises?

A. From the fall of 1954 to 1955.

The Court: Can you be more specific on what you mean by the fall?

The Witness: Well, to the best of my knowledge, I believe they rented that apartment in September, and that I believe it was in January when they gave us our notice—their notice.

Q. (By Mr. Jensen): Did you know them as man and wife? A. Yes.

Q. By what given name did you know Mrs. Frisone? A. Nora.

Q. And by what name, what given name did you know Mr. Frisone? A. Tony.

Q. Mrs. Smith, did they own, or did they have with them a vehicle,—an automobile? A. Yes.

Q. What kind of an automobile was it?

A. It was a Plymouth.

Q. And the body style?

A. A station wagon.

Q. And its color? A. Blue.

(Testimony of Inga Constance Smith.)

Q. Do you recall the year? [154]

A. No, I wouldn't exactly.

Q. Mrs. Smith, the tenants in the adjoining property at 7540 Lexington, is their light and gas metered separately from the other units of your rental property? A. Yes.

Q. Is it your custom and practice, if you have a custom and practice, for the tenants to secure the gas and light in their own name? A. Yes.

Q. Was this done in respect to the Frisones?

A. Yes.

Mr. Jensen: You may have the witness. Oh, one further question.

Q. Mrs. Smith, you had occasion today, while you were here in court, to speak to both of the defendants, did you not? A. Yes.

Q. And you have talked to each of them?

A. Yes.

Q. You are satisfied that they are the same people as your tenants, are you not? A. Yes.

Mr. Jensen: You may have the witness. [155]

Cross Examination

Q. (By Mr. Cantillon): Mrs. Smith, when is the first time that anyone inquired of you relative to the tenancy of the defendants here at 7540 Lexington Avenue? A. The first time?

Q. That an inquiry was made of you relative to that tenancy.

A. Well, I guess, to the best of my memory, I believe it was about six months ago, five or six

(Testimony of Inga Constance Smith.)
months ago. A man came to my house and inquired about them, one of the FBI agents.

Q. He identified himself, did he?

A. Yes, he did.

Q. And do you have any records of this tenancy? A. No.

Q. Any rental receipts at all? A. No.

Q. Let me ask you this: Do you remember a woman coming to talk to you in the early part of March of 1957, a blond woman, relative to the tenancy of the Frisones at 7540 Lexington Avenue?

A. A blond woman? Not that I recall.

Q. Well, did a woman come and identify herself as Marcelle Edwards, Mrs. Edwards? [156]

A. I don't recall it.

Q. Let me ask you this, to see if this refreshes your recollection: Did a woman come to you some time in March, 1957,——

Mr. Jensen: Your Honor please, I will object.

The Court: Just a minute.

Mr. Jensen: I will object to this as being immaterial and irrelevant.

The Court: Oh, no. I will instruct the jury, however, that if she admits it, it is all right. If she denies it, then they are not to imply anything from the question, just as I did before.

Mr. Jensen: Very well, your Honor.

The Court: The witness having testified they occupied the premises, he may attempt to show that she made a statement contradictory of that to somebody. That is permissible.

(Testimony of Inga Constance Smith.)

Mr. Jensen: Very well.

The Court: And that is the purpose. But I will tell the jury that if she denies it, they are not to imply, unless the person who claims to have had the conversation comes on the stand, is sworn, and says that such a statement was made. In the course of the instructions I will tell you how testimony of a witness is impeached. That is permissible.

Go ahead. Read the question, please. [157]

Mr. Cantillon: I believe I just got started, your Honor. I will withdraw it, if that is agreeable.

The Court: No, I don't want you to. Then the objection will not stand, and what I have said will not stand, and I will have to repeat.

Let's start in and see if she can answer. Maybe she will answer so far as you have gone, and then you can ask another question.

Read the question, please. I thought the question was completed.

(The question was read.)

The Court: The prior question was more complete. Go ahead and complete the question, with the understanding that the objection is made, and I will overrule it, and the observations I have made apply to the completed question. Go ahead.

Q. (By Mr. Cantillon): Did a woman come to you, physically described as I have heretofore stated, and state to you that she was interested in ascertaining the dates that the Frisones stayed as tenants at your apartment, and you stated to the woman, in effect, that you had no recollection as

(Testimony of Inga Constance Smith.)
to the specific time, or even generally as to the year, that you had no records. The woman then asked you if you couldn't look and see if you had some rent receipts, fixing the approximate time, and you stated no, [158] that you remembered them quite well, that they were respectable tenants, and apparently that you had no problems with them, but that you couldn't—you were unable to tell her when they were tenants at 7540 Lexington Avenue. Now, does that refresh your recollection?

A. No, it doesn't, but, however, having had tenants who move in and move out, I have had several occasions where people have come and inquired about them, and if I have been able to help them, or give them any information, I would. Otherwise, of course, I couldn't.

So there have been occasions when I have talked with people, and I just wouldn't recall that that was something pertaining to the Frisones, or someone else at the time. But this just doesn't ring a bell with me.

Q. Let me see if this will help you ring a bell. She asked you concerning three years, 1953, 1954, and 1955, and asked if you were able to fix the tenancy in any one of those three years, as either commencing or terminating in any of those three years, and if you didn't state to her that you were unable to do it?

A. That I could fix their what?

Q. Fix their tenancy as either beginning or ending in 1953, 1954 or 1955? A. No.

(Testimony of Inga Constance Smith.)

Q. And if you didn't tell her that you didn't know, and [159] I believe your husband was present at the time, and if you both didn't state that you didn't know, and that you had no records from which you would be able to refresh your memory.

A. Well, I am sorry, I can't. I just don't recall the incident.

Mr. Cantillon: I have nothing further.

The Court: All right. Anything further?

Mr. Jensen: No, your Honor.

The Court: All right. Mrs. Smith, step down. You may be excused.

The Witness: Thank you.

(Witness excused.) [160]

* * * * *

BENJAMIN SMITH

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Ben Smith.

Direct Examination

Q. (By Mr. Jensen): Mr. Smith, would you state your full name to us, so that we can all hear it? A. I beg your pardon?

Q. Would you state your name to us, please?

A. Do you want the full name?

Q. Yes, please.

A. Benjamin Joseph Aloisius St. Patrick Smith.

Q. Thank you. Mr. Smith, where do you reside?

(Testimony of Benjamin Smith.)

A. At 7538 Lexington Avenue.

Q. And was the woman who just left the stand your wife? A. Yes, sir.

Q. Do you have some rental property adjoining your apartment at an address of 7540 Lexington Drive, Hollywood, California?

A. Yes. Lexington Avenue, California.

Q. I am sorry, Lexington Avenue. Did you at one time have occupying those premises at 7540 Lexington Avenue the [161] defendants Mr. and Mrs. Frisone, here to my left? A. Yes.

Q. Do you recall when they occupied those premises?

A. It was around the holidays, around—from around September until right after the holidays.

Q. Of what year?

A. I think, to my mind,—I tried to look it up, but I couldn't find it, but I think it was in '54. My wife would know, because she tends to that, about the property.

Q. Do you know the two defendants, Mr. and Mrs. Frisone, as man and wife? A. Yes.

Mr. Jensen: You may have the witness.

Cross Examination

Q. (By Mr. Cantillon): Mr. Smith, you state that you don't recall what year it was in.

The Court: Mr. Cantillon, a little louder.

Q. (By Mr. Cantillon): Mr. Smith, you state you do not recall what year this tenancy took place in?

(Testimony of Benjamin Smith.)

Mr. Jensen: If the court please, I object to that. That is not his testimony.

The Court: That is all right. He will answer. Go ahead. You may answer. [162]

The Witness: It was in—I think it was '54.

Q. (By Mr. Cantillon): How do you fix that as being the year?

A. Well, we figured it up by different tenants that lived there, and we figured it down to about the time that they lived there.

Q. In other words, you figured it with your wife? A. Yes. With my wife, yes.

Q. Going back?

A. Yes, going back because—I had a checkbook, and a list of different things there, and they were thrown out and destroyed, because that was four or five years ago, and you don't just keep a lot of books for that length of time.

Q. Let me ask you this: Do you remember a woman coming to your home last March, the beginning of March of 1957, and do you remember that she talked to you and your wife, and that you told her, or your wife told her in your presence, that the records of the tenancies had been destroyed for 1954, and 1955, and 1953?

A. Well, no, I never remember that. I never remember any woman coming there, and I never remember in my presence that my wife ever told her that they were destroyed, that the records were destroyed.

Mr. Cantillon: I have nothing further.

The Court: All right. [163]

Mr. Jensen: You may step down, Mr. Smith.

The Court: You may step down, Mr. Smith. You may be excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Jensen: Yes, your Honor. Mr. Govlya.

JOHN GOVLYA, JR.

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please.

The Witness: My name is John Govlya, Jr., G-o-v-l-y-a.

Direct Examination

Q. (By Mr. Jensen): Would you pronounce your last name for me? A. Govlya.

Q. Govlya. Do I say it correctly?

A. That's right.

Q. Mr. Govlya, where do you reside, generally?

A. I live at 1531 Penmore Avenue in Venice, California.

Q. And you are employed by whom?

A. I am employed by the Southern California Edison Company, an electric utility company.

Q. How long have you been so employed? [164]

A. I have been employed by the Edison Company for approximately four and a half years.

Q. You were working there during the year 1954, then?

(Testimony of John Govlya, Jr.)

A. Yes, I started February 1, 1954, after I was released from the Army.

Q. And what is the nature of your work?

A. At present I am a bookkeeper for the Edison Company.

Q. Are you familiar with the books and records of the Southern California Edison Company?

A. Yes, sir.

Q. At the request of the United States—incidentally, you haven't seen me before today, have you?

A. No, sir. I had a heck of a time finding this place.

Q. At the request of the United States, and under a subpoena duces tecum, did you bring certain records with you here to court today?

A. Yes, sir.

Q. I will ask you whether included in those records is a connection, or a record of a connection for light in the name of Frisone for an address of 7540 Lexington Avenue, Hollywood, California?

A. Yes, sir. West Hollywood, California, we show.

Q. You call it West Hollywood?

A. West Hollywood 46. We don't serve Hollywood. We serve West Hollywood. [165]

The Court: Is Hollywood being segmentized now?

The Witness: We used to have Hollywood, but not today.

The Court: I see. All right.

(Testimony of John Govlya, Jr.)

Q. (By Mr. Jensen): You do show the street address, 7540 Lexington Avenue?

A. Yes, sir.

Q. And the name?

A. For which period, sir? For this period we show a party by the name of Anthony Frisone came in or phoned our West Hollywood office—it wasn't Anthony, it was Mrs. Frisone—she called our West Hollywood office, asking us to turn the service on at 7540 Lexington Avenue, West Hollywood, California, September 7, 1954.

Q. And how long did you render service to the Frisones at that address in 1954? Let's do it this way: When was that service connection terminated?

A. It was terminated on January 17, 1955.

Q. Was it continuous through that period of time? A. Yes, it was.

Q. Were the bills paid?

A. Well, I don't—well, let me look here. We have changed our bookkeeping system since this period.

Well, it seems that there weren't any arrears on the several billings that they received. We bill every two months, and I believe they only received one billing, the [166] regular bi-monthly billing, and then the off-order, and the closing out was $11.10. I don't know if that has been paid. It may have been.

Q. Mr. Govlya, do you have any given names on that account? I mean by that, any first names?

A. Yes. I have the on-order, which was Anthony

(Testimony of John Govlya, Jr.)

Frisone, and it was phoned to us, like I said, by Mrs. Frisone, giving the phone number of Hollywood 2-8032, and then the off-order was taken at the counter in West Hollywood on the 17th of January, the same day that we terminated the service.

Mr. Jensen: You may have the witness.

I wonder if we could mark the records for identification.

Mr. Cantillon: No objection.

Mr. Jensen: Might they be delivered to the clerk in an envelope?

The Court: Deliver them to the clerk.

The Witness: I need a receipt for them.

The Court: He will give you a receipt, and we will photostat them, because these are original records of a public utility company. Just leave those that you testified to.

The Witness: It may need some explaining to be done there.

The Court: All right. The clerk will give you a receipt and these will be returned to you. You don't need the subpoena.

The Witness: All right.

The Court: We don't keep these. The company knows.

The Witness: Just give me a receipt, and I will leave them.

The Court: We know you are required by the Public Service Corporation to keep records. The clerk will give you a receipt.

The Clerk: Government's 4, for identification.

(Testimony of John Govlya, Jr.)

(The document referred to was marked Government's Exhibit 4, for identification.)

The Witness: May I be excused, then?

The Court: As soon as you get the receipt. You want the receipt, don't you?

The Witness: Yes, sir.

(Witness excused.)

The Court: Let's go to the next witness.

Mr. Jensen: Mr. Murray Podolsky, will you come forward, please.

MURRAY PODOLSKY

called as a witness by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: Your name, sir?

The Witness: Murray Podolsky, P-o-d-o-l-s-k-y.

The Clerk: And the given name? [168]

The Witness: Murray.

Direct Examination

Q. (By Mr. Jensen): Mr. Podolsky, would you state your full name loud enough for all of us to hear, please?

A. Murray Podolsky. Accent the "d."

Q. Podolsky. I think that is about as close as I am going to get to saying it right. Where do you reside?

A. 13361 Blythe Street in North Hollywood.

Q. By whom are you employed?

A. Southern California Gas Company.

(Testimony of Murray Podolsky.)

Q. How long have you been so employed?

A. Five years.

Q. Mr. Podolsky, you are inclined to speak with a very soft voice. Would you push it up a little and talk a little louder? A. Okay.

The Court: Lean back.

Q. (By Mr. Jensen): What is the nature of your employment, Mr. Podolsky?

A. I am a records control clerk.

Q. Have you been such during the course of your employment with Southern California Gas Company? [169] A. Yes, I have.

Q. Are you familiar with the books and records of the Southern California Gas Company?

A. Yes, I have to be.

Q. Mr. Podolsky, you haven't seen me before today either, have you? A. No, I haven't.

Q. At the request of the United States, and under a subpoena duces tecum, have you brought certain records here to court with you today?

A. Yes, I have.

Q. Do they pertain to an account for the premises at 7540 Lexington Avenue in Hollywood?

A. Yes, they do.

Q. And during the period of September, 1954, through the first part of January, 1955, what name is that account in?

A. It is under the name of N. Frisone.

Q. When was that account opened?

A. The party turned on on September 3, 1954.

Q. And when was that account closed?

(Testimony of Murray Podolsky.)

A. It ran through to January 17, 1955.

Q. And was it a continuous account in that name through that entire period?

A. Yes, it was. [170]

Mr. Jensen: You may cross examine.

Mr. Cantillon: I wonder if the records might be marked for identification, the records from which the witness testified?

The Court: Yes, they may be marked.

The Witness: I have some photostats, your Honor.

The Court: Oh, what a smart record clerk you are. The witness furnishes us with photostats.

Will you gentlemen take a look and see if we can use them? We try to educate these public utilities and public official representatives to that, but sometimes they don't remember.

Mr. Jensen: Let me ask him a question. Have you compared the photostats with the originals?

The Witness: Yes.

Q. (By Mr. Jensen): Are they the same?

A. Yes, sir, they are.

Mr. Jensen: We will accept them on that, your Honor.

The Clerk: Government's Exhibit No. 5.

(The exhibit referred to was marked Government's Exhibit 5, for identification.)

The Witness: I thought you might want to have the meter sheet also. This (indicating) is the turn-on date, and this is the closing date.

Mr. Cantillon: He is just explaining that this

(Testimony of Murray Podolsky.)

wasn't on the record. I was trying to figure whether I wanted this or not, and he was telling me. [171]

The Witness: Then Anderson was the occupant in the apartment prior to this.

The Court: He would not want that.

Mr. Cantillon: I don't need this.

The Court: We will let you keep your records, and these four photostats will be accepted as the correct representation of the records kept showing this.

Mr. Jensen: I might announce to these two gentlemen that if they will go to the reception desk at the United States Attorney's office on the 6th floor, they can draw their witness fees up there.

The Court: That is all right.

The Witness: Is that all, sir?

The Court: You may be excused, yes, sir.

(Witness excused.) [172]

* * * * *

NORA MATHIS FRISONE

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The Court: Would it be more convenient for you if we put a chair there so you would not have to climb these stairs?

The Witness: I think I will be all right, your Honor. Thank you.

The Court: You think you will be all right?

The Witness: Yes, I think so. I need to stand, do I?

The Court: You may sit down when you take the stand. That is all right.

The Clerk: Your full name, please?

The Witness: Nora Frisone.

The Clerk: No middle name?

The Witness: No, sir.

The Clerk: Your middle name is not Mathis?

The Witness: Well, that was my maiden name, sir. [322]

The Clerk: Thank you.

The Court: Now, just lean back and be as comfortable as you can.

Direct Examination

Q. (By Mr. Cantillon): Mrs. Frisone, you are the wife of the defendant, Anthony Frisone?

A. Yes, I am.

Q. When were you and Mr. Frisone married?

A. July 21, 1956.

Q. Where was that marriage?

A. In Henderson, Nevada.

(Testimony of Nora Mathis Frisone.)

Q. Now, you testified at your husband's trial in March, 1957. Do you remember testifying?

A. Yes, I do.

Q. At that time you were under bond as a material witness for the Government?

A. Yes, I was.

Q. And you testified as a witness for the defense? A. Yes, I did.

Q. Now, you were asked the following question,——

Mr. Jensen: May I have the record page?

Mr. Cantillon: I am referring to the indictment, Count I, lines 18 to 21: [323]

"Q. Nora, did you work in the house Mi Rancho at Rosarita Beach?

"A. I was there one night."

Now, is that true, that you were there at Mi Rancho, Rosarita Beach, one night?

A. That's true.

Q. And did you work there?

A. Yes, I did.

Q. With what occupation?

A. As a prostitute.

Q. You were asked the following questions, and to which you gave the following answers:

"Q. Do you recall seeing Anthony Frisone at Mi Rancho?

"A. No, I do not.

"Q. Can you state definitely at the time that you were there that he was not there?

"A. Yes, I can.

(Testimony of Nora Mathis Frisone.)

"Q. Then it is your testimony that he was not there?

"A. I did not see him there.

"Q. You were, you say, at Mi Rancho for one night? "A. Yes, I was."

Now, is that testimony true? [324]

A. That testimony is true.

Q. Now, where were you immediately before you went to Mi Rancho?

A. I believe, if I remember right, I was in Tijuana.

Q. And were you working in Tijuana?

A. Yes, I was.

Q. And at the same occupation?

A. Yes, I was.

Q. For how long had you been in Tijuana?

A. Well, the best I can remember, that also—I think I had been there about a week.

Q. Now, let me ask you, do you remember the date that you went to Mi Rancho?

A. No, I do not.

Q. Do you remember the month?

A. I only know it was in December.

Q. Was it before or after Christmas?

A. Well, it must have been after Christmas, because I spent Christmas in Tijuana.

Q. And where were you working in Tijuana?

A. At the Mayer Hotel.

Q. At the Mayer Hotel? A. Yes.

Q. And were you working with anybody?

A. At that time I was alone. [325]

(Testimony of Nora Mathis Frisone.)

Q. And had you gone to the Mayer Hotel at anybody's instigation? How did you get there?

A. Well, I had been working there off and on with Ginger.

Q. With Ginger, the girl, Norma Jean Scholes, who testified here earlier? A. Yes.

Q. How long had you been working off and on at the Mayer Hotel in Tijuana with Ginger?

A. Well, several months.

Q. How did you get from Tijuana, Mexico, to Mi Rancho?

A. I believe it was with Peter DiLeo, and Ruby, and a young lady named Kathy.

Q. Now, you heard Janet Prideaux and Norma Jean Scholes both testify at the prior trial and at this trial that they saw you and Mr. Frisone together at Mi Rancho. Now, is that true? Were you together with him at Mi Rancho?

A. It couldn't possibly have been true, because I didn't see him at Mi Rancho.

Q. Now, was it by pre-arrangement with somebody that you went to Mi Rancho?

A. Yes, it was.

Q. And with whom?

A. Well, I believe that I had received word from Mr. DiLeo that the place was opening, and asked if I would like [326] to be there, and I had stated, yes, that I would.

Q. Incidentally, how long had you worked as a prostitute, if you had worked as a prostitute, prior to December of 1954?

(Testimony of Nora Mathis Frisone.)

Mr. Jensen: If the court please, I will object to that as being immaterial. It is too remote to the issues in this case.

Mr. Cantillon: It is on the subject, your Honor.

The Court: I will sustain the objection.

Mr. Cantillon: May I make an offer of proof in that regard?

The Court: No.

Mr. Cantillon: I beg pardon?

The Court: The question itself is sufficient.

Mr. Cantillon: Is the objection sustained?

The Court: Yes, I sustained the objection, and the question you asked itself indicates what you intend to prove.

Q. (By Mr. Cantillon): What areas had you worked in?

The Court: It is not material at all.

Mr. Cantillon: It is material, your Honor.

The Court: As I said before, we are not trying a Mann Act case. We are trying a perjury case.

Mr. Cantillon: I think it is material, your Honor, on the subject of intent, the specific intent to wilfully falsify.

The Court: I have already ruled, and the record will indicate it. [327]

Q. (By Mr. Cantillon): When had you first met this Ginger Scholes, Norma Jean Scholes?

Mr. Jensen: If the court please, I don't know, but perhaps my hearing is defective. I can't hear counsel, and I am sitting right alongside of him.

(Testimony of Nora Mathis Frisone.)

The Court: Yes, speak a little louder, Mr. Cantillon.

Q. (By Mr. Cantillon): When did you first meet Norma Jean or Ginger Scholes?

A. I believe it was in the first part of 1954 some time, either the early winter or spring.

Q. Were you working at that particular time?

A. Yes, I was.

Q. And in what area, and at what occupation?

Mr. Jensen: If the court please, the same objection, that it is too remote, and immaterial and irrelevant.

The Court: I will sustain the objection. It is not material in this case, and would not be material in a Mann Act case either, because the offense may be committed only by transporting a woman.

Mr. Cantillon: It would not be material? We went all through it last time, relative to the prior and subsequent conduct, and I am offering it, your Honor, on the proposition again, as I say, of the wilfulness, the intent.

The Court: The fact that this woman was a prostitute [328] and had been for quite a long while doesn't bear on the issue before us one way or another.

Mr. Cantillon: I believe, your Honor——

The Court: You have brought it in, and I have allowed you to ask her, but how long she has been is not material at all. It would not be material in a Mann Act prosecution either. This does not go to motive or intent at all.

(Testimony of Nora Mathis Frisone.)

Mr. Cantillon: Will the court let me make an offer of proof, please, and I believe I can convince the court?

The Court: You will have to do it outside the presence of the jury. Step up here, and make your offer of proof, although I may say we discourage offers of proof.

(The following proceedings were had between court and counsel at the bench, outside the hearing of the jury:)

Mr. Cantillon: Perhaps your Honor discredits my offer of proof, but I am making it for the court's benefit as much as mine.

I anticipate this woman will testify in some respects that she was in error, that what she testified to wasn't true, so I want to establish that she was a prostitute during three or four years, during which time she lived with many men and made numerous trips to and from Mexico; that this particular one night she was at Rosarita Beach was about as insignificant an incident in her life as, I imagine, pulling on shoes and socks is for all of us.

The Court: Go ahead.

Mr. Cantillon: And I am offering it to show that at the time she testified at the prior trial she was not intimate with Mr. Frisone until some time after the first of the year of 1955, she was honestly mistaken as to when their association commenced, and in reality did become intimate, and her inability to recall it prior to the records being put in evidence was attributable to the fact that

(Testimony of Nora Mathis Frisone.)

she had led an irresponsible life, and had lived as a prostitute throughout the various cities of California, Nevada, and in Tijuana, and in Florida, and lived with many men and resided in many houses of prostitution before and subsequent to meeting this man.

The Court: I may say this: In the first place, that would only be material if they brought it out. It might be material as an explanation, and if she states that some of this testimony was not true that is in the second count, then she may give that as an explanation, that she has had affairs with so many men that one more does not make any difference.

Mr. Cantillon: Then my offer of proof was not fruitless.

The Court: There is an eastern circuit that says that you can discount the testimony in a Mann Act case by saying, "Why should the man that had taken his mistress across the line do that?" And one of the dissenting judges said, "Why should he transport her to do things he had been doing [330] for years?" But that is argument, and not evidence, and I don't think we can go into it at the present time. If she admits——

Mr. Cantillon: Then we will get to that.

The Court: ——and gives that as her reason, that that had been the case, then that will be permissible, but you can't anticipate that by painting her in such a manner in advance.

(Testimony of Nora Mathis Frisone.)

Mr. Cantillon: At any rate, I will proceed to Count II, and then go back to this subject.

The Court: Yes, but to do it now is out of line, you see.

Mr. Cantillon: I see. Thank you.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: I am sorry, ladies and gentlemen, we are taking so much time, but these questions arise, and counsel at times desire to amplify their position in the hope that the court might, in the light of a fuller explanation, change its ruling.

The ruling stands. Proceed to the next question.

Mr. Cantillon: Very well, your Honor.

Q. Mrs. Frisone, at the last trial you were asked this question:

"Q. When was that, approximately?

"A. That was in the spring and summer of 1954.

"Q. Did you know Mr. Frisone at that time?

"A. No, I did not." [331]

Now, did you know Mr. Frisone in the spring and summer of 1954? A. No, I did not.

Q. Now, you were also asked the question:

"Q. Now, some time in the fall of 1954 did Ginger take up a residence in San Diego County?"

And you answered, "Yes."

And you were asked, "And did you go to that residence?"

And you answered, "Yes, I was there."

Now, is that true?

A. That is also true.

(Testimony of Nora Mathis Frisone.)

Q. Now, you were asked:

"Q. Did you know Mr. Frisone during this period of time while you were operating out of Ginger's house in San Diego as a prostitute?"

Now, in that connection, let me ask you this: How many times did you operate in San Diego as a prostitute with Ginger, and over what period of time?

Mr. Jensen: I will object to that as being immaterial and irrelevant.

The Court: I am going to sustain the objection at the present time, but you can go back to the question she was asked, and then if she wants to give details and an explanation of her action, she may. [332]

Mr. Cantillon: All right. I will repeat the question.

The Court: I mean your question which you are reading from the indictment.

Mr. Cantillon: Yes, sir.

The Court: I am merely sustaining the objection at the present time to your interpolation, shall I call it,—to the interpolated question. Go ahead.

Q. (By Mr. Cantillon): (Reading):

"Q. Did you know Mr. Frisone during this period of time while you were operating out of Ginger's house in San Diego as a prostitute?"

And you answered, "Casually."

Now, let me ask you this: How many times, if there was more than one time, and over what periods of time, if it extended over any periods, did

(Testimony of Nora Mathis Frisone.)
you work as a prostitute out of the home or house of Ginger in San Diego?

Mr. Jensen: Just a moment. I will object on the same ground. It is immaterial and irrelevant.

The Court: I think if she wants to explain what she means by "casually," she may do that, but again it is her relationship to the defendant which is the gist of this charge, this assignment of perjury in that count. I haven't been following it, and it may be——

Mr. Cantillon: If your Honor will read page 4, lines 24 through 28, and my question, I think [333] perhaps the court might reconsider the ruling.

The Court: No, I think the very answer she gives afterwards shows that the relationship she is talking about is the relationship to Mr. Frisone. I will sustain the objection.

You may proceed along the lines of these questions, as you did before.

Q. (By Mr. Cantillon): You then stated, "I think I had met him at the La Madelon where he was working as a bartender."

The Court: Wait a minute. You didn't read the question. After her answer, "Casually," you didn't read, "When you say 'casually' what do you mean by that?"

Mr. Cantillon: This is direct examination, and I didn't particularly care to read that. I wanted to back up to the time factor, and that is what I was attempting to get at.

The Court: What is that?

(Testimony of Nora Mathis Frisone.)

Mr. Cantillon: This is my direct examination, and I am going to back up to the time factor in a moment.

The Court: But you can't split a thing of this character by interpolation. You have got to follow it as it is given, by asking each question, and then if an explanation is in order, she can make it, but you can't just do that out of an indictment. This is not examining an ordinary witness. This is a categorical denial of statements—no—a categorical defense, rather, of statements that she made, and, therefore, you are allowed to ask the categorical question, "Is it true [334] or is it not true?"

Mr. Cantillon: You see, your Honor, that is where we are getting a little apart here. This is not a case of——

The Court: We are not getting apart. You are getting apart.

Mr. Cantillon: This is not a categorical denial, your Honor, and it is not intended to be, and I should not be confined to reading the indictment.

The Court: If you don't want to read the indictment, then when you read any portion of this, if you want to skip a question and answer, yes, but you cannot skip a question and give merely the answer, because that is the context in which the answer was given.

Mr. Cantillon: I am going to ask the question in this particular fashion:

Q. At the last trial, Mrs. Frisone, among other things, you made the statement to the effect that

(Testimony of Nora Mathis Frisone.)

you had met your husband at the La Madelon, where he was working as a bartender. Now, is that true?

Mr. Jensen: Now, just a moment. If this is not for the purpose of a categorical denial, I will object that it is leading and suggestive.

The Court: I will sustain the objection. The question should be asked right in the form in which it was asked.

Q. (By Mr. Cantillon): When did you meet your husband, [335] Mrs. Frisone?

A. That's not too clear in my mind, but as far as I can ascertain, it was in 1954 some time, while he was working as a bartender at the La Madelon .

Q. Now, at the previous trial you testified, in substance, that you had not become intimate with Mr. Frisone until some time in the early part of 1955. Now, do you have a reason for saying at this particular time that——

The Court: No, don't tell her. Ask her if it is true, in the same manner. You cannot make this kind of an examination. She ought to answer categorically whether that statement was true, or whether she believed it to be true at the time, and, if not, and in either event, she can explain.

Q. (By Mr. Cantillon): At the time that you made the statement, did you believe it to be true?

Mr. Jensen: Just a moment. I don't think the record shows what the reference is to the statement.

The Court: No. You have got to read the statement, so we will know what we are talking about.

(Testimony of Nora Mathis Frisone.)
Read the statement so that we will know what we are talking about. Go ahead.

Mr. Cantillon: I am at a complete loss, Judge, at this particular point to know how to proceed.

The Court: I am sorry. I am not running a law school. [336] When a person is charged directly, you have a right to ask her the question, and ask her if she gave the answer. If she says it is true, then that ends it. That is what you have done with the other.

You cannot start in by taking questions in one manner, and then omitting others by summarizing them. You can't do that in a perjury case, because the perjury charge is statements made specifically in a particular manner. You started out right. As to questions that she knew in advance she would answer, it is true, but now that you are in doubt you are changing your method, and it is not permissible. You may skip the entire subject, if you don't want to cover it. You don't have to.

Mr. Cantillon: Well, I don't want to do so.

The Court: Then you will have to ask the question and answer in the manner in which she was asked at the trial, and if she wants to give an explanation other than an answer "Yes," or "No," she may, but you will have to ask the question in the manner in which it is set forth in the indictment. If this indictment had not set forth that she was asked about this and she answered in this manner, it would have been insufficient, because the law of perjury requires that the specifications be in the

(Testimony of Nora Mathis Frisone.)
exact words in which the question was asked and answered.

Mr. Cantillon: I am willing to learn, Judge. Don't [337] misunderstand me.

The Court: Well, let us not go into that. Don't start to martyrize yourself now, you know.

Mr. Cantillon: No, but I will start back up with the last question.

The Court: You may skip any of them, but you cannot read an answer unless it is in the words she gave, and unless you read the question to which that was the answer.

Go ahead.

Q. (By Mr. Cantillon): I am referring now to page 4, line 29:

"Q. When you say 'casually' "—this is the question—"what do you mean by that?

"A. I think I had met him at the La Madelon where he was working as a bartender."

Now, is it true that you met your husband at the La Madelon, where he was working as a bartender?

A. Yes, sir. I have already stated that.

Q. "Had you ever been out with him"—then you were asked the question, "Had you ever been out with him socially or dated him?

"A. No, I don't think so."

Well, now——

Mr. Jensen: Do we have a question before the witness?

The Court: No. He is trying to think how to frame the [338] question. Give him a chance.

(Testimony of Nora Mathis Frisone.)

Mr. Jensen: Certainly.

Q. (By Mr. Cantillon): (Continuing) Now, is it true that during the period of time while you were operating out of Ginger's house that you had never been out with your husband socially or dated him? Do you understand the question?

A. Not quite.

Mr. Jensen: Might I say as to the reference in the transcript to this, unless it is a categorical denial, I will object as being leading and suggestive, your Honor.

The Court: I think it is permissible to ask the question. Go ahead. You may answer.

The Witness: Well, I would like the question re-read, if you don't mind re-reading it, please.

The Court: Read the last question, please.

> (The question referred to was read as follows: "Q. 'Had you ever been out with him'—then you were asked the question, 'Had you ever been out with him socially or dated him?
>
> 'A. No, I don't think so.'
>
> Now, is it true that during the period of time while you were operating out of Ginger's house that you had never been out with your husband socially or dated him? Do you understand the [339] question?")

Q. (By Mr. Cantillon): Do you understand it now?

A. Yes, I believe I understand the question, but it is rather a difficult question to answer because of the fact that there was more than one time when I

(Testimony of Nora Mathis Frisone.)
worked with Ginger in San Diego at different places, and, therefore, it is rather hard for me to establish what sequence the events occurred in. In other words, I don't quite—unless I know what specific incident is being referred to, I can't say whether I had met him yet or whether I hadn't.

The Court: Well, the previous question to which this relates refers specifically, or asks specifically, "Did you know Mr. Frisone during this period of time while you were operating out of Ginger's house in San Diego * * *?"

The Witness: Yes, sir, but that doesn't say when.

The Court: Well, the previous question relates to 1954. You see, these are—I will show her. May I show her this?

Mr. Cantillon: Surely, your Honor.

The Court: Take a look at this. You see, this is the sequence.

The Witness: Yes, sir.

The Court: And they are talking of 1954. You see, the first question you have already answered, so that is what they are talking about.

The Witness: Well, you see, now here it states when, [340] but just until I saw it, I didn't know what part of 1954 he was speaking of.

The Court: All right.

The Witness: Because, as I said, there were separate incidents.

The Court: All right. Now, how do you want to answer, or what do you want to add to what you have already said?

(Testimony of Nora Mathis Frisone.)

The Witness: I believe that in the fall of 1954 I had met my husband when he was working at the La Madelon as a bartender.

The Court: All right.

Q. (By Mr. Cantillon): At the time that you—let me ask you this: You were asked the question:

"Isn't it a fact that on or about the 27th or 28th of December of 1954 that Anthony Frisone drove you across the Mexican border to Tijuana?"

And you answered, "It is not a fact."

Then you were asked the question, "You would say that it is not true, then?

"A. It is not true."

Now, is it true or is it not true that he drove you across the border to Mexico on or about the 27th or 28th of December, 1954?

A. It is not true.

Q. Then you were asked, "Do you say that you knew the [341] defendant Frisone only casually?"

To which you answered, "Yes."

And then you were asked, "When did your acquaintance become more intimate?"

And you answered, "Two or three months later."

And then you were asked the question, "Some time early in 1955?"

To which you gave the answer, "Yes."

Now, is it true that you did not become intimate with Mr. Frisone until early in 1955, or is that false?

A. I believed at the time that I testified that

(Testimony of Nora Mathis Frisone.)
that it was true, but I have since found out that it was not true.

Q. And what was the basis of the facts that you relied upon in the belief that that was true, at the time that you testified it was true?

A. Well, there was—as I said before, there were a lot of things that I couldn't put in exact sequence. That was a pretty busy time during my life, and things were happening so quickly, and in such rapid succession, that I couldn't quite place which came before which. And, therefore, at the time—previous to the trial I was certain that it was in the beginning of 1955 that we had become intimate, but after we had followed your advice and sent an investigator to see the landlady at the first place where we had lived together, and she had stated that she had no idea when it was except [342] just that it was in the winter, I was positive that it was in January, 1955, because I had nothing else to go on.

Q. When was the first time that you were called upon to fix a date as to which time you and Mr. Frisone became intimate?

A. Well, if I remember correctly, and I am not sure that I do, it was before the trial in 1957.

Q. Now, did you have any discussions with anyone in attempting to fix a time at which you and Mr. Frisone became intimate?

A. Well, Mr. Frisone and I discussed it between ourselves, and we couldn't exactly agree upon when it was because neither of us knew for sure.

Q. Was there some disagreement in that dis-

(Testimony of Nora Mathis Frisone.)

cussion? A. Yes, there was.

Q. What was the disagreement?

A. Well, he felt that it was before the incident, and I felt that it was after the incident.

Q. Now, by "incident," what are you referring to?

A. The Rosarita Beach incident.

Q. Incidentally, did you and do you now, other than in connection with these trials, associate Anthony Frisone in any way with the Rosarita Beach incident?

A. I did not then, and I do not now.

Q. Prior to this night you spent at Rosarita Beach, [343] you state you had worked as a prostitute; is that correct? A. That's true.

Q. And did you work as a prostitute after that event, having gone down there one night and returned? A. Yes, at a later date.

Mr. Jensen: Excuse me. I would appreciate it if the court would indulge me by having that question re-read.

The Court: Read it, please.

(The question and answer were read.)

Q. (By Mr. Cantillon): Now, had you ever resided with any person other than Anthony Frisone prior to December 27th or 28th, of 1954?

A. Yes, several.

Q. And over what period of time?

Mr. Jensen: If the court please, I think this is immaterial and irrelevant.

The Court: Yes, I will sustain the objection. She

(Testimony of Nora Mathis Frisone.)
has already stated what her occupation was, and, of necessity, it would imply associating with men either on a temporary basis or a permanent basis, and practicing what, euphemistically, George Bernard Shaw called "Mrs. Warren's profession." So I can't see that going into more detail has any bearing upon the issues before the court.

Mr. Cantillon: May I renew the offer of proof at this particular time that I previously made? [344]

The Court: That is right. The offer will be rejected upon the grounds I have stated in the record.

Q. (By Mr. Cantillon): Now, you were asked, "It is your testimony, is it not, that Mr. Frisone was only casually known to you during the summer of 1954?"

And you answered, "That is right."

Now, is that true, that he was only casually known to you in the summer of 1954?

A. I believe that to be true.

Q. And you believe it to be true now?

A. Yes, I do.

Q. Now, between December 27th or 28th, 1954, and March 26, 1957, did you and Mr. Frisone keep company with one another from time to time?

A. Now, are you referring to between December, 1954, and the time of the trial?

Q. Yes. A. Yes, we did.

Q. Was this a steady sort of a romance. I am talking now preceding the marriage.

A. No, sir, I wouldn't say it was very steady.

Q. And during this period of time, did you and

(Testimony of Nora Mathis Frisone.)

Mr. Frisone occupy various residences together?

A. Well, several that I can think of, and I know there were several others that I can't think of. [345]

Q. How many altogether, would you say?

A. Well, I can remember—I can remember four.

Q. And is that between the time of December and the time you were married? A. Yes.

Mr. Jensen: If the court please, I hesitate to interrupt but counsel is leading considerably.

The Court: That is not objectionable, because if she does not remember the time and the number of places, he can help her with dates.

By four, you mean including the one which the Smiths testified about?

The Witness: No, sir, I mean independently.

The Court: In addition to that one?

The Witness: Yes.

The Court: Four others?

The Witness: Yes.

The Court: That would be five?

The Witness: Yes.

The Court: I see. All right.

Q. (By Mr. Cantillon): During the period of time that intervened from the one night you were at Rosarita Beach and the trial last March a year ago, did you work at the occupation of prostitution?

A. Yes, sir, up until the time that I was married. [346]

Q. And was this confined to any particular part of the United States?

(Testimony of Nora Mathis Frisone.)

Mr. Jensen: If the court please, I will object to that as being immaterial and irrelevant.

Mr. Cantillon: It is on the proposition of her recollection, your Honor, and the places.

The Court: All right.

Mr. Cantillon: I mean, if the court feels this——

The Court: No, I will let her answer that. I will let her answer that.

The Witness: Would you read the question for me, please?

(The question was read.)

The Witness: No, it wasn't.

Q. (By Mr. Cantillon): While you were working here in the Southern California area, did you meet this girl, Janet Prideaux—— A. Yes.

Q. ——that testified? A. Yes, I did.

Q. And did you observe her using any barbiturates or pills? A. Yes, I did.

Mr. Jensen: Just a moment. I will object to the word "barbiturates." It would be a conclusion on the witness' part. [347]

The Court: She wouldn't know. Seconal, of course, isn't a drug. Having been in the hospital three times, I know that seconal is not a barbiturate.

Q. (By Mr. Cantillon): Did you see her taking a lot of pills? A. Yes, I did.

Q. Was she commonly referred to as Pillhead or Dingaling? A. She certainly was.

Mr. Cantillon: I have no further questions.

(Testimony of Nora Mathis Frisone.)

Mr. Jensen: Your Honor, might we take our afternoon recess before the cross?

The Court: All right, so that you won't be interrupted.

Do you need help to get down?

The Witness: No, your Honor.

The Court: All right. May it be stipulated the usual admonition has been given?

Mr. Jensen: Yes, your Honor.

Mr. Cantillon: So stipulated.

The Court: We will take a short recess.

(A short recess.)

The Court: Let the record show the jurors and two alternates in the box, and the defendants in court with their counsel.

You may proceed, Mr. Jensen.

Mr. Jensen: Thank you, your Honor. [348]

Cross Examination

Q. (By Mr. Jensen): Mrs. Frisone, do you recall the conversation that the two FBI agents testified as having with you in Jacksonville, Florida in May of 1956?

A. Are you asking me, do I recall?

Q. Yes. A. Yes, I do.

Q. And did you state to those two officers that you had been living with Anthony Frisone for two years up to the time of that conversation, which was in May of 1956? Did you make such a statement in substance or effect to them?

A. It's possible that I made such a statement.

(Testimony of Nora Mathis Frisone.)

Q. That would mean that you would be living with him from May of 1954 on, wouldn't it?

A. I don't believe I stated it definitely, that it was two years. I didn't state any definite amount of time. I said, "Maybe a couple of years," which could mean most anything.

Q. I take it, in respect to knowing Mr. Frisone casually in the fall of 1954, that the testimony you gave in the prior trial is false; is that correct?

A. I have found it is.

Q. And you now recall having lived with Mr. Frisone at the residence on Lexington Avenue that was rented to you [349] by the Smiths?

A. I recalled living with him on Lexington Avenue. What I didn't recall was the——

Q. No, just a moment.

A. ——the exact time.

The Court: No, she has a right to do that. Finish your answer.

The Witness: What I started to explain was that I recalled living at that residence. What I didn't recall was the time that the residence occurred.

Q. (By Mr. Jensen): Do you recall Mr. and Mrs. Smith?

A. Yes, I recall Mr. and Mrs. Smith.

Q. Was this the first of these five places that you lived at with Mr. Frisone?

A. I have already stated that that was the first place that we lived together.

(Testimony of Nora Mathis Frisone.)

Q. And you don't recall the very first place that you lived with him?

A. No, as I have stated, it was the Lexington Avenue address.

The Court: I think you misunderstood the witness, Mr. Jensen.

Mr. Jensen: Perhaps I did.

The Court: She said that was the first time that they lived together. [350]

Mr. Jensen: At the Lexington Street address?

The Court: At the Lexington Avenue address. That is what I understood you to say. Isn't that what you said?

The Witness: Yes, sir.

The Court: And the other four places were after that?

The Witness: Yes, sir.

Q. (By Mr. Jensen): The Lexington Street address was the first place you lived with Mr. Frisone? A. Yes, it is.

Q. And you lived with him there through September, October, November and December?

A. No, I didn't reside there all that time.

Q. You lived there all that time, didn't you?

A. No, I didn't.

Q. Were you gone from those premises for any substantial periods of time?

A. I certainly was.

Q. How long?

A. As I recall, I think six weeks or two months.

Q. Continuously?

(Testimony of Nora Mathis Frisone.)

A. I believe so, unless I might have gone back to pick up some of my clothing that I had left there.

Q. At what period in that time?

A. I believe, if my memory serves me correctly, I believe that Mr. Frisone and I had quite a serious—— [351]

Q. Just a minute. All I asked you was the time that you were absent.

A. I am trying to explain it to you, if you don't mind.

The Court: That is all right. If an incident in their relationship helps her to recall the dates, she has a right to refer to it. Go ahead.

Q. (By Mr. Jensen): Can you give me the months, please?

A. If you will let me finish my answer.

The Court: Yes, I told you you could finish your answer.

The Witness: Thank you, your Honor.

The Court: Go ahead.

The Witness: As I was saying, I believe we had quite a serious disagreement some time in the month of November.

The Court: All right. You think you left then?

The Witness: Yes, whenever——

The Court: You think it was in November?

The Witness: It was in November.

The Court: And you think you can say how long you were gone?

The Witness: Well, it was—I know I was gone

(Testimony of Nora Mathis Frisone.)
until after the Rosarita Beach incident occurred. I believe it was some time in January.

The Court: Then you went back. Did you go back to the address? [352]

The Witness: No, sir, because at that time we moved to another address.

The Court: Then you say you didn't go back to that address at all. That would make it more than two months. I think the evidence shows that he left,—what was it?

Mr. Jensen: The rental was terminated in the first part of January, your Honor.

The Witness: January 17th was the date.

The Court: January 17th, wasn't it?

The Witness: Yes.

Q. (By Mr. Jensen): So you were absent from those premises from some time in the first part of November through the balance of the rental period, even past the date in January when the rental was terminated?

A. As I stated before, I might have gone back to collect some things that I had left there.

The Court: But not to remain there for any length of time?

The Witness: No, sir, not to remain there for any length of time.

Q. (By Mr. Jensen): Do you recall when you went back?

A. I can't recall the exact date.

Q. Were you present in that house just before Christmas of 1954?

(Testimony of Nora Mathis Frisone.)

A. As I said, it is possible that I was. [353]

Q. Do you recall a conversation that you had with Mrs. Smith just prior to Christmas of 1954, in substance and effect, that you were going to be gone over the Christmas holidays, that you were going to visit your mother?

A. It is quite possible that I made such a statement. I didn't believe it was anyone else's business if we were quarreling.

Q. And you say that you had been absent from November up until that time?

A. I said except for an occasional trip back to—excuse me—to pick up some clothing.

Q. How long were you down in Tijuana prior to going to Rosarita Beach?

A. I have already stated I believe I was there about a week.

Mr. Jensen: May I have just a moment, your Honor?

Q. How long before you took up residence with Mr. Frisone did you start going out with him and dating him,—how long before you lived with him?

A. As I remember, I don't believe we ever had but just one or two more just social dates.

Q. What period of time did you know him before you started living with him?

A. Only a short time. I would say maybe a month or so.

Q. So you would have known him some time in August? [354] A. Yes, that's possible.

Q. You say you did not see nor spend any time

(Testimony of Nora Mathis Frisone.)
with Anthony Frisone at Rosarita Beach; is that correct?

A. I have stated that several times.

Q. And, I take it, you did not spend the night with him there, the night that you were there?

A. I did not.

Q. Mrs. Frisone, you mentioned that you sent an investigator out to the Smith's house to determine the date that you had stayed there; is that correct?

A. That's correct.

Q. Did you hire that investigator?

A. I don't know just exactly what those arrangements were.

Q. Were the arrangements made with you, Mr. Frisone, or Mr. Cantillon?

A. I believe Mr. Cantillon made the arrangements for us.

Q. Did you know the investigator yourself?

A. I had met her.

Q. After she came back from the Smiths' place, did she talk to you, or did you talk to her?

A. She talked to us.

Q. And she told you that the Smiths recalled your being there, but couldn't recall the date? [355]

A. That's true.

Q. Did she also tell you that the Smiths didn't have any records of when you were there?

A. She told us that the Smiths had stated that they did not have the receipts on hand, and that they could not recall the exact time.

Q. Isn't it a fact, Mrs. Frisone, that after you

(Testimony of Nora Mathis Frisone.)
learned that, that you felt it was safe to fabricate when you had first started living with Mr. Frisone?

A. Mr. Jensen, I don't think it is ever safe to fabricate.

Q. You say that you did not then feel that it was something you could get away with?

A. No, sir, I did not feel it was something that I could get away with. I used it merely as a basis to try to orient myself, so that I could discover in what sequence these things happened.

Q. Why didn't you go out and see Mr. and Mrs. Smith yourself?

A. Well, there were several reasons why I didn't go to see Mr. and Mrs. Smith myself. To begin with, I didn't have the time. I was also advised by my attorney that because this was a Federal case, it might be better if we sent someone else.

Mr. Jensen: I have no further questions.

The Court: Any redirect, Mr. Cantillon? [356]

Mr. Cantillon: No, your Honor.

The Court: All right. Step down, please.

(Witness excused.)

The Court: Call your next witness.

MARCELLE EDWARDS

called as a witness by and on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Your full name, please?

The Witness: Marcelle Edwards.

The Clerk: Marcelle?

The Witness: Yes, sir. M-a-r-c-e-l-l-e.

The Clerk: Thank you.

Direct Examination

Q. (By Mr. Cantillon): Mrs. Edwards, directing your attention to the people sitting at the defense counsel table, Mr. and Mrs. Frisone, have you seen them before? A. Yes.

Q. Do you recall the date that you first saw them? A. Yes, it was March 23, 1957.

Q. And whereabouts?

A. In your office, the Cantillon office.

Q. Had someone summoned you to the office?

A. Yes.

Q. Do you remember who it was?

A. Mr. Cantillon.

The Court: There are father and son there?

The Witness: Well, it was Jimmy's father.

The Court: Jimmy's father. All right.

Q. (By Mr. Cantillon): Was I present?

A. Yes.

Q. And were you asked to contact some people on Lexington Avenue? A. Yes, I was.

Q. Do you recall what the name of the people was? A. Mr. and Mrs. Smith.

(Testimony of Marcelle Edwards.)

Q. Do you remember what instructions you were given relative to contacting them?

Mr. Jensen: I will object to that. It is hearsay, if your Honor please.

Mr. Cantillon: It was in the presence. It was in the presence of the Frisones, and is offered, your Honor, for the limited purpose on the question of wilfulness.

The Court: She may answer. Are you a professional investigator?

The Witness: Well, I am an investigator for Richard Cantillon.

The Court: I see. All right. [358]

The Witness: Shall I answer?

The Court: Yes, you may answer.

The Witness: I was told to go to see the landlady, which was Mrs. Smith, or Mr. Smith, to try to find out what date the Frisones had lived at that address.

The Court: All right. That is sufficient.

Q. (By Mr. Cantillon): Following that, did you go to the address? A. I did.

Q. Did you see Mr. or Mrs. Smith, or Mr. and Mrs. Smith? A. I saw Mrs. Smith.

Q. Do you recall the date it was that you went out to see her?

A. Yes, sir. It was the 23rd. I went right after leaving the office.

Q. How much time did you spend with her?

A. I would say about a half an hour.

Q. And did you talk to her about Mr. and Mrs.

(Testimony of Marcelle Edwards.)

Frisone? A. Yes, I did.

Q. Did you ask her if she could tell you when they were tenants at her apartment house?

A. Yes, I did ask her.

Q. And what, if anything, did she say?

A. She told me she remembered them very well, because [359] they had been such a nice couple, but that she did not keep any records, and it could have been either in 1953, '54 or '55. She did remember that it was some time in the winter.

Q. Did she give you any idea as to the length of time they had been there?

A. She said it was about three or four months.

Q. Following that conversation with Mrs. Smith, did you report the substance of the conversation to Mr. and Mrs. Frisone? A. Yes, I did.

Mr. Cantillon: I have no further questions.

Cross Examination

Q. (By Mr. Jensen): Did you report to Mr. and Mrs. Frisone that the Smiths had told you it could have been '53, '54, or '55? A. That's right.

Mr. Jensen: I have no further questions.

The Court: All right. You may step down, Mrs. Edwards.

The Witness: Thank you.

(Witness excused.)

The Court: Call your next witness.

Mr. Cantillon: Mr. Frisone. [360]

ANTHONY FRISONE

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Your full name?

The Witness: Anthony Frisone.

Mr. Cantillon: Might I have just a moment, your Honor? I am getting my indictments confused.

Direct Examination

Q. (By Mr. Cantillon): Will you state your name, please? A. Anthony Frisone.

Q. And where do you live, Mr. Frisone?

A. Here in Los Angeles.

Q. Whereabouts?

A. On 634 South Gramercy Place.

Q. And what is your occupation?

A. At the present time I am employed by the Grolier Society as a sales manager.

Q. You remember you were on trial here last March? A. Yes, I do.

Q. Now, at that time you were asked the following questions, and gave the following answers:

"Q. Did you ever have an occasion at any time to go to Mr. DiLeo's establishment in Mexico [361] at Rosarita Beach? "A. Yes, I did. I——"

Did you give such an answer?

A. Yes, I did.

Q. And is it true that you went to Mr. DiLeo's establishment at Rosarita Beach?

A. Yes, I did.

Q. You were then asked:

"Q. When was that, sir?"

(Testimony of Anthony Frisone.)

And you gave the answer, "I think it was right after the holidays. I can't remember just exactly which day it was. I believe it was a day off, or I was due for a day off after the new year had started, and I drove down—well, Mr. DiLeo had called me and told me he was in operation and that would I come down and look it over and see if—bring the gambling into the club, so I said, 'Well, I'll see if I can come down and look it over.' "

Did you testify to that? A. Yes, I did.

Q. And is that true?

A. Yes, that's true.

Q. There was more to the answer than appears in the indictment. I will read the balance of the answer:

"Well, after work one evening I drove down and I tried to locate him at his home in San Diego. [362] I finally located the street, but there was no one at home. I then proceeded to drive over to Tijuana where I ate some breakfast and I think I went out to Mi Rancho after breakfast. There I talked to him about this."

Is that true? A. That is true.

Q. You were then asked this question:

"Q. Isn't it true that you actually spent some few days at Mi Rancho between Christmas and New Year's of 1954?"

And you answered, "It is not."

Now, is it true that you did not spend some few days at Mi Rancho between Christmas and New Year's Eve in 1954?

(Testimony of Anthony Frisone.)

A. I did not spend any few days at Mi Rancho in 1954.

Q. You were then asked the following question, to which you gave the following answer:

"Q. Directing your attention to 1954, and particularly the month of December, what was your occupation at that time?

"A. At that time I was employed as a bartender by the La Madelon, Inc., here in Los Angeles."

Is that true? A. That is true.

Q. The next question you were asked was: [363]

"Q. Now, where were you between the week of from December 24, 1954, to January 1, 1955?"

And you answered, "Well, during the evenings I was employed, still employed by the La Madelon as a bartender, and I went to work generally, I think it was about 9:00 o'clock in the evening or might have been one or two evenings a week that I would go in at 8:00, which we called an early shift, but Christmas—no, I worked Christmas, New Year's Day, which would be January the 1st of 1955, I was at my mother's house in San Bernardino. The rest of the time I worked."

Now, is that true? A. That is true.

Q. You were asked the question:

"Q. I see. Now, you worked then, Mr. Frisone, at La Madelon from some time at the end of August or sometime in August of 1954 until sometime in March of 1955?"

And you gave the answer, "March or April."

Is that true? A. That is true.

(Testimony of Anthony Frisone.)

Q. You were asked the question:

"Q. And you recall definitely now that Christmas Day you worked at La Madelon?"

And you gave the answer, "I don't know about Christmas Day." [364]

Then you were asked the question, "Christmas night?"

And you gave the answer, "Christmas night, yes."

Then you were asked the question, "Do you recall that definitely? "A. Yes.

"Q. Could it have been Christmas Eve?

"A. Well, wait a minute. Let's get this straight. When you say Christmas night, which do you mean, Christmas Eve or Christmas Day night?

"Q. I take it in the common meaning, sir. I mean the night of Christmas Day is Christmas night.

"A. No. I couldn't swear positively, but I don't think that I worked.

"Q. You don't think that you worked on Christmas Eve?

"A. No, Christmas Day night.

"Q. You didn't work on Christmas Day night?

"A. That's right.

"Q. Did you work the following night?

"A. Yes, sir."

Now, do you recall those questions being asked?

A. I recall the questions being asked, and the answers that you read off are the answers that I gave there in the matter of the testimony.

Q. Are they true answers? [365]

(Testimony of Anthony Frisone.)

A. They are true answers.

Q. Then you were asked, "You have an independent recollection of working that night?

"A. Well, I wouldn't say an independent recollection, but I worked throughout the week.

"Q. Can you state positively that you worked on that night in question?

"A. Yes, I can state positively.

"Q. And the next day would be the 27th of December. Do you have an independent recollection of having worked that night at La Madelon?

"A. I worked throughout the week. I didn't take any extra days off other than I had coming to me.

"Q. Do you have an independent recollection of having worked at the La Madelon on the night of December 27, 1954? "A. Yes.

"Q. You can say that definitely?

"A. I would say that I worked there on December 19th—27, 1954."

Now, do you recall what you meant to convey when you gave the answer, "I would say that I worked there on December 19th—27, 1954," or do you recall that answer specifically?

A. I don't recall the answer specifically, but I think 1954 was trying to come out of my mouth, and it came out [366] before "27," and then I switched. I wouldn't say for sure.

Q. (Reading):

"Q. You can say definitely that you did?

"A. As best as I can remember."

(Testimony of Anthony Frisone.)

Now, do you remember those questions being asked, and do you remember those answers being given? A. Yes, sir.

Q. Were those answers true?

A. Those answers were true.

Q. Now, the next question, "I appreciate your difficulty, but I am asking, can you remember definitely?"

And your answer, "When you say 'definitely' just exactly what do you mean? That is not very clear, by your definition of 'definitely'; might be a little different than mine.

"Q. Do you have any independent recollection at this time of having worked on that night?

"A. Yes.

"Q. Do you have an independent recollection of having worked the night of December 28, 1954?

"A. Yes.

"Q. Can you say definitely that you did?

"A. Yes.

"Q. Do you have an independent recollection of having worked the night of December 29, 1954?

"A. Yes.

"Q. You can say definitely that you worked that night?

"A. Yes, I can say definitely I worked that night.

"Q. Do you have any independent recollection of having worked the night of December 30, 1954?

"A. Yes.

"Q. Definitely you can say that you did?

(Testimony of Anthony Frisone.)

"A. I definitely can say that I worked December 30th, which would be New Year's Eve of 1954."

Then the question, "I am sorry. I thought December 31st would be."

And your answer, "If December 30th was the New Year's Eve, that's the day I worked and I worked the day before it, so that makes it a definite proposition about December 30th."

Now, did you give those answers to those questions? A. I did.

Q. Are they true answers?

A. Those are true answers.

Q. Now, you were asked the following questions, to which, Mr. Frisone, you gave the following answers:

"Q. Let me ask you this: At the time that this took place in December of 1954, did you know [368] your present wife, Nora, at that time?

"A. I had met her. I had seen her. I think I had met her. I had seen her.

"Q. In December of 1954?

"A. Somewhere about that time.

"Q. And you would say then that around the first of the year of 1955 your acquaintance with her was casual?

"A. No. After the first of the year of 1955—I don't know what the—exactly the date, but we started going out together."

Did you give those answers?

A. Yes, I did.

(Testimony of Anthony Frisone.)

Q. Now, you were asked these questions:

"Q. In mid-December of 1954, did you know your present wife at that time?

"A. I was acquainted with her. I had seen her.

"Q. Had you ever dated her at that time?

"A. No.

"Q. Had she ever been in your automobile at that time?

"A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took—— [369]

"Q. Had she been in it while you were with her?

"A. No, not while——"

Now, are those true answers, that is, insofar as they purport to convey that you knew your wife only casually in December of 1954?

Mr. Jensen: Well, if the court please,——

The Court: Strike out everything after, "Are those true answers?" Afterwards he can explain the answer. You cannot put into a question what he purported to convey. If he wants to explain his answer, and that goes to his intent.

Mr. Cantillon: Then may I approach the bench? I don't think we need the reporter. I just want to make one point clear.

(Discussion between court and counsel at the bench off the record.)

The Court: Let the record show that counsel requested that the discussion, being merely a matter of technique, not be taken down by the reporter. All right.

(Testimony of Anthony Frisone.)

Q. (By Mr. Cantillon): You recall all of those questions and answers that I just listed for you?

A. Yes, I recall them.

Q. Now, are the answers true?

A. At the time I gave those answers, I believed them to be true. [370]

Q. Now, you know them to be otherwise at this time?

A. Yes, I know them to be otherwise at this time, for the simple reason that—well, in order to—there is a series of events that leads up to this.

Q. Let me ask you this: How do you know them to be false at this particular time?

A. Primarily, from the records of the gas company and the light company that were produced at this particular trial. Now,——

Q. Now, why did you believe these statements to be true at the time that you made them?

A. Because at the time that I made those statements I was under indictment, and I was to appear in court here on a previous trial, and I was trying to establish time; in other words, to find out when I had started living with my present wife, when our acquaintance began, where we had lived, when we became intimate, and several other different things.

Q. Now, with whom did you discuss, if you discussed with anyone,—strike that.

Did you talk to anybody at all in attempting to fix this time?

(Testimony of Anthony Frisone.)

A. Yes, I did. I talked to several people.

Q. Did you talk to me?

A. Yes, I talked to you. [371]

Q. Directing your attention to Defendants' Exhibit F, for identification, and particularly page 2 thereof,——

Mr. Jensen: If the court please, this is the item that was offered earlier today and refused by the court.

The Court: I don't remember that.

Mr. Cantillon: That is the United States Attorney's trial memorandum, your Honor.

The Court: I do not know how he can be examined as to a memorandum filed in the other case.

Mr. Cantillon: I don't know whether I have even asked the question yet.

The Court: What?

Mr. Cantillon: I don't think I have asked a question yet. I just told him to look at it.

The Court: But I don't see how he can be examined at all as to a document which has not been introduced in evidence and which is merely a memorandum.

Mr. Cantillon: If he looked at that memorandum in connection with refreshing his recollection as to the events as to which he testified at the last trial, and if he took that memorandum and its allegations into consideration, then I think he can properly testify to that.

The Court: If that be a fact, he should not be

(Testimony of Anthony Frisone.)
shown the memorandum. He can testify what made him think that. You can ask him, because when intent is a matter involved, [372] he can tell what made him think the date was right. If he should say he was misled by the statement of the United States Attorney, which he saw, let him say so, and it is up to the jury.

Mr. Cantillon: That is what I was trying to get at.

The Court: Let him do it himself. Let him give his reasons. He can bring in his reasons. The thing is you are trying to put it in the other way. Let him give the reasons, and not show him the document. You see, that would not make it admissible either.

Mr. Cantillon: I wasn't offering it.

The Court: The objection will be sustained. You may ask him for his reasons. He had started to give the reasons.

Mr. Cantillon: May I have the last question, please?

(The portion of the question was read.)

Mr. Cantillon: I had better complete my question, your Honor, so that I can have my record.

The Court: Yes, you may complete it.

Q. (By Mr. Cantillon): (Continuing)—did you discuss with me the contents of that document, and particularly the portion thereof that I referred to?

Mr. Jensen: Just a moment. I will object, that that is irrelevant and immaterial, if the court please.

The Court: I will sustain the objection.

(Testimony of Anthony Frisone.)

Q. (By Mr. Cantillon): Whom, other than myself, did [373] you speak to, if you spoke to anyone else, concerning fixing a time for your meeting and becoming intimate with your present wife?

A. Well, I not only spoke to people,—I spoke to my wife, I spoke to my brother, I read documents there were presented to me in the form of indictments and pretrial—I don't know the correct term for it—allegations, what the District Attorney was going to intend to prove, and different times and dates that he contended that I was somewhere, and we were in complete disagreement—my wife, and myself, and even my brother—so at your suggestion we hired——

The Court: Mrs. Edwards?

The Witness: ——Mrs. Edwards to go out and try to establish the correct time that I had lived with my present wife on Lexington Avenue.

This she did, and came back and talked to me about it, and told me what Mr. and Mrs. Smith had told her.

From this, from talking to my wife, and from talking to my brother, from trying to put events in their proper places, and reading different material, this is how it came about.

Q. (By Mr. Cantillon): Whom did you talk to, other than your wife, and your brother, and Mrs. Edwards? Name the other people.

A. Well, I talked to Leola Gerson, I talked to George [374] Redman, I talked to Rudy, I talked to Paul Mandell—no, I take that back. Not at that

(Testimony of Anthony Frisone.)
time I never talked to Paul Mandell, because he wasn't even here. I talked to another girl, Shirley Von Shenk, who was a waitress at the La Madelon.

I talked to several other bartenders who were at the La Madelon at the same time that I was. In other words, in my own mind I made a sincere effort to establish time and place.

I knew that I—the first place that I lived with my wife was the first time that I became real intimate with her.

Q. Let me ask you this: Mrs. Edwards testified that she told you that the Smiths could not remember whether your residence with them was in 1953, 1954, or 1955. Did the year 1953 have any significance to you concerning that prior case at the time that she made that report to you?

A. No, because I wasn't even in Los Angeles in 1953. If I was, it was an occasional visit.

Q. At that particular time was there any question in your mind concerning whether or not you had commenced intimacies with your present wife in the year 1953? A. None whatsoever.

Q. Had you read any document purporting to accuse you of that?

A. That is a pretrial statement, I think it is called.

Q. A pretrial statement? [375]

A. I think that is what it is called. I don't know exactly what it is, the correct terminology, but it was something sent out by the United States District Attorney's office, on what day they were al-

leging what I had done at certain dates, which included 1953 and 1954.

The Court: Did I understand you to say that you didn't remember that you had gas and lights in the place until the records were produced here?

The Witness: I honestly did not remember, your Honor, because I must have lived—I always lived in a furnished apartment. Generally the lights and the gas are provided and figure in in the amount of the rent.

Well, since 1954 I venture to say I have lived in almost—especially the last year, because I have been traveling for this company, in over a hundred places. That is quite a lot of moves.

The Court: I see. They publish books, don't they,—the Grolier Company?

The Witness: The Grolier Society. They publish the Book of Knowledge, that is one, and I work for that division. They also publish the Americana.

The Court: All right.

Mr. Cantillon: I don't believe I have anything further, your Honor.

The Court: All right, Mr. Jensen, let's go on.

Cross Examination

Q. (By Mr. Jensen): Mr. Frisone, you said that the testimony to the effect that you did not spend some few days at Mi Rancho between Christmas and New Year's was correct. Let me ask you this: Were you there opening night?

(Testimony of Anthony Frisone.)

A. I don't even know when opening night was.

Q. Were you down there at any time between Christmas and New Year's of 1954?

A. I can't state that definitely. I think I made that statement before. I was down there once. I know it was during the holidays, or after the holidays. I think it was after the holidays, but I can't state definitely. It's four years ago now, and at the time I was on trial it was three years ago.

The Court: Pardon me. I didn't mean to interrupt but you didn't tell us. You say you visited one day there?

The Witness: I didn't say one day, your Honor. I said I had been down to Mi Rancho one time.

The Court: You told us something about breakfast.

The Witness: I had breakfast in Tijuana.

The Court: You went down there, and I don't remember you telling your counsel how long you stayed that day. Did you?

The Witness: I didn't stay very long. [377]

The Court: Did you leave the same day?

The Witness: Yes, I left there——

The Court: Did you make that statement a little while ago from the stand?

The Witness: It is in the record of the last trial, your Honor.

The Court: No, I am not talking about the last trial. I wasn't at the last trial. I didn't preside.

The Witness: I know.

The Court: What I am talking about is, I didn't

(Testimony of Anthony Frisone.)
hear you say when you left. I remember your saying that you had breakfast in Tijuana, and then drove down.

The Witness: They didn't ask me that question.

The Court: They didn't ask you. All right. Then you left the same day?

The Witness: I certainly did.

The Court: All right. Go ahead.

Q. (By Mr. Jensen): Mr. Frisone, in December of 1954 did you own a blue Plymouth station wagon? A. I did.

Q. And you say that you were not asked specifically whether or not you were down there between the holidays or afterwards?

A. I didn't say that. I said I don't remember just exactly when, but as clear as I can define it, it was after [378] the holidays.

Q. Let me ask you this,——

The Court: When you say "holidays," you mean Christmas and New Year's Eve?

The Witness: Christmas and the new year.

The Court: Or just Christmas itself?

The Witness: Christmas and the new year.

The Court: I see. So when you say "after the holidays," it would be after the new year?

The Witness: After the new year.

The Court: After the new year. All right.

Q. (By Mr. Jensen): Were you ever down there late in the evening, when there was a big crowd of people there, people from the states, a lot of girls around, a lot of drinking? I am not talk-

(Testimony of Anthony Frisone.)
ing about the police officers or Mexican officials now, but when a party was going on? Were you ever at Rosarita Beach at Mi Rancho under those kind of circumstances.

A. Well, let me put it to you this way,——

Q. Can't you answer me "Yes" or "No"?

A. No, I cannot answer "Yes" or "No" to that question. You say late at night. What do you mean by late at night?

Q. I am sorry. Let me rephrase my question. In the fall or winter months of 1954 or 1955, were you ever at Mi Rancho in the evening hours, say, from 6:00, 7:00, 8:00, 9:00, 10:00 o'clock on up to midnight, at Mi Rancho now, where a [379] party was going on, there were a number of guests present, drinks were being served, there were a number of girls present, and it was in the nature of a celebration. Were you ever present at Mi Rancho under such circumstances?

A. Not in 1954, to the best of my knowledge.

Q. And not in 1955 either?

A. I was down there at one time, and as best as I can recollect, it was in 1955. It was after the new year. It was an occasion—everything is an occasion at the La Madelon—there was a lot of shooting when I came down there.

Q. Just a minute. I am talking about Mi Rancho.

A. I am talking about Mi Rancho also.

Q. You mentioned La Madelon.

A. No. I am sorry.

(Testimony of Anthony Frisone.)

Q. You misspoke yourself. Mr. Frisone, at the time you were down there in January of 1955, were there a number of guests, and were drinks being served, were there a lot of girls present?

A. There was a lot of commotion.

Q. I didn't ask you that. Would you answer my question, please?

A. Would you repeat the question?

The Court: Read the question.

(The question was read.)

The Witness: There were girls present. There were men [380] present.

Q. (By Mr. Jensen): Were drinks being served?

A. Not to my knowledge.

Q. Was the place in operation?

A. I don't know whether it was in operation. Peter DiLeo told me it was.

Q. How long did you work for La Madelon?

A. For almost a year, to the best of my recollection.

Q. And when did you start? When did your employment start?

A. Well, at the last trial——

Q. I am sorry.

The Court: No, no. Please answer. He has a right to a definite answer, and then you may explain later on. You have a very competent lawyer, and don't try to argue your case.

Q. (By Mr. Jensen): Would you tell me——

The Court: Answer the question. Read the question.

(Testimony of Anthony Frisone.)

Mr. Jensen: I will withdraw that question, your Honor, and, if I may, rephrase it.

The Court: All right.

Q. (By Mr. Jensen): Mr. Frisone, will you tell me when you commenced your employment as a bartender at La Madelon?

A. In 1954, to the best of my knowledge.

Q. What month? [381]

A. I don't remember exactly what month.

Q. How long did you work for them?

A. About a year.

Q. Was that continuous?

A. That was continuous.

Q. Were you paid by check?

A. Not at all times.

Q. Did you go for months at a time without being paid by check? A. Yes.

Q. Do you recall going from September of 1954 through the first part of January of 1955 without receiving your pay in a check?

A. I received my pay. I couldn't swear definitely whether it was in a check, whether it was in whiskey, whether it was in groceries, or just what it was. There were several different ways of being compensated at the La Madelon.

Q. What is your memory about your going that length of time without ever having received a pay check in check form—your pay in a check?

A. This is four years ago.

Q. Well, what is your memory about it?

A. I can't remember definitely. There was

(Testimony of Anthony Frisone.)

times when I received checks. There was times when I didn't receive [382] checks, and sometimes they ran for long periods of time, either way.

Q. Would you explain to me, Mr. Frisone, how you expected other people to recall when you became intimate with your wife, and you couldn't remember your own intimacy with her as to the date?

A. To the best of my knowledge,—you are asking me to recall, is that right?

Q. No, I am asking you why you thought other people would recall it better than you.

A. Well, because I was not definite in my own mind.

Q. You were the man who was intimate with her, weren't you?

A. I have been intimate with a lot of girls besides my wife, before I met her.

Q. Did you ever live with any of them for four months? A. Possibly longer.

Q. I take it, you felt satisfied when Mrs. Edwards told you that you could have lived with the Smiths in 1953, 1954 or 1955,—you felt satisfied on the basis of that information to come in here and testify that your intimacy did not commence with your wife until 1955? A. I wasn't satisfied.

Q. Why did you so testify, then?

A. Well, because, due to the fact that the indictment [383] which was handed me was marked in 1953 and 1954, which stated these times.

I knew I hadn't been, to the best of my knowledge

(Testimony of Anthony Frisone.)
at the time of the trial, I hadn't been in Los Angeles in 1953. If I had, it had only been periodic, for a day or two in and out, or for a visit. I won't say for sure, and that is still a long time to be able to be positive.

In 1954 some time I started working at the La Madelon. Previous to working at the La Madelon, I believe I lived in San Bernardino or Las Vegas.

Now, when she mentioned winter, that was brought out by Mrs. Smith to me, there was only one winter which I was here, which could have been '54-'55. That along with my wife—talking to my wife, and talking to my brother, and talking to Mrs. Gerson, and talking to several other people is how I established those facts in my own mind, and up until those records were presented here, I firmly believed in my own mind that what I said was true at the trial, and up until yesterday or the day before I still held it to be true. Since then I have found out I am in error.

Q. I take it, then, since yesterday or the day before, when the Government introduced that testimony, you couldn't of your own recollection recall within four months when you started living with your present wife? A. No. [384]

Q. By the way, you were not in 1954 employed by the Grolier Society, were you?

A. No, I was not.

Mr. Jensen: I have no further questions.

The Court: Any redirect?

(Testimony of Anthony Frisone.)

Redirect Examination

Q. (By Mr. Cantillon): When did you become employed——

The Court: I beg your pardon?

Mr. Cantillon: I was just asking the question, your Honor.

Q. When did you become employed by this Society? How long have you worked for them?

A. Approximately about a year. I think it was last June I went to work for them, June of 1957.

Q. Let me ask you, did you work more than one New Year's Eve at the La Madelon?

A. No, I did not.

Q. Do you have any special recollection of New Year's Eve, working there, or any sums of money that were earned? A. Yes, I do.

Q. What do you remember earning?

A. Well, I worked with Roy Martin on New Year's Eve. It was the biggest time at any time that I have tended bar, [385] that we cut up tokens or tips, you can call them either one. We used two large mixing cans, and we split $180.

Q. You definitely recall that?

A. I definitely recall it. As a matter of fact, one of the owners said, "We'll trade you what you have got in the mixing cans for the register."

Q. The next question is, how did it get from the register to the mixing cans?

A. They are known as tips.

Q. Let me ask you this, which I neglected to ask you on direct: What sort of an operation was this

(Testimony of Anthony Frisone.)

La Madelon? Was it a well organized or a somewhat disorganized nightclub operation?

Mr. Jensen: If the court please, that is immaterial and irrelevant.

The Court: He can describe what he found it to be there, but to ask him to characterize it one way or the other is not proper.

Mr. Cantillon: I will withdraw the question, your Honor.

Q. Will you describe the operation during the time you were in there, as to employees, and employers, and so forth.

A. Well, there was——

Mr. Jensen: Pardon me. If the court please, that is immaterial and irrelevant, and I object to it on that ground. [386]

The Court: It is—well, I will not say anything. There has been some testimony given by the first witness as to the method of operation, and so forth, and I think——

M.r Jensen: She testified about an operation in February. I didn't object at that time.

The Court: But she told about the way it was run.

Mr. Jensen: There is no issue involved here how they operated the La Madelon.

The Court: It may bear upon the question of whether——

Mr. Cantillon: As to his employment, your Honor.

The Court: ——whether payment was always

(Testimony of Anthony Frisone.)
made by cash, or in any other manner, and it may bear upon that,—the manner in which a place is run. We have testimony to the effect that everything earned by employees was paid by check, and, on the contrary, this witness testified that he was paid in cash, so I think that will bear upon the matter.

Go ahead, just in that sense. We are not interested in anything else, you know.

The Witness: Well, while I was working at the La Madelon — I was hired by Paul Mandell or Paul Cuccia—it was always in a state of confusion.

Q. (By Mr. Cantillon): What about the finances?

A. Between partners, between finances, between who was going to steal for who.

Q. Who were the various owners while you were there? [387]

A. When I first went to work there, Paul Mandell was an owner, Stan Mattoon was an owner, and then there was a fellow that was back East that was not resident. I believe it was some time in August or September that Jack Cawood became an owner. He bought out the eastern owner. Some time in December the joint—the nightclub—excuse me, your Honor, I was going to say "joint"—the nightclub was in the process of being sold, or it was sold. It was sold a couple of times while I was employed there. One time——

Q. Was this while Mr. Mattoon was there, when it was sold a couple of times?

(Testimony of Anthony Frisone.)

A. He was there each time.

Q. And what about his sobriety? Was he sober?

A. I can't say that I ever seen him sober outside of today.

Q. And what about these bartenders, was there only you and Mr. Martin as bartenders there, or were there a lot of other people tending bar?

Mr. Jensen: If the court please, this is all leading and suggestive, and not proper redirect.

The Court: I know it isn't redirect, but he may ask him.

The Witness: I will say during the period of time that I worked there, there must have been at least a dozen or two dozen bartenders. Anybody was a bartender. Anybody that wanted to work for nothing at the La Madelon was welcome to go [388] to work there.

The Court: A lot of volunteers; is that it?

The Witness: They were glad to get cheap help. They didn't even pay union scale to their bartenders.

Q. (By Mr. Cantillon): Can you name some of the people? A. Yes, I can.

Q. All right. Name them.

A. As bartenders, there was myself, Peter DiLeo, Jack Cawood, Stan Mattoon, Rudy Pepillo, Bill Rose, Roger Gilmore, or something to that effect, Pat Caliendo, a fellow by the name of Joe, another fellow by the name of Sam, another fellow by the name of Stan, Sol——

Q. Roy Martin? A. Roy Martin.

(Testimony of Anthony Frisone.)

The Court: All right.

The Witness: And several others.

Mr. Cantillon: I have nothing further.

Recross Examination

Q. (By Mr. Jensen): Mr. Frisone, how is it you can remember the details and the dates on the financial arrangements and the ownership of the La Madelon, and all the bartenders that were there, and you couldn't remember the date that you first started [389] living with your wife?

A. I didn't recall any specific dates of the financial arrangements.

Q. Didn't you state that the ownership transferred in August?

A. I said it was sold a couple of times, I believe once in August, while I was work there, which was one period of time. I had been going with my wife for a long time before I even married her, which was an on and off romance.

Mr. Jensen: I have nothing further.

The Court: All right. Step down.

(Witness excused.) [390]

* * * * *

LEO FRISONE

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Please sit down, sir. What is your full name?

The Witness: Leo Frisone.

Direct Examination

Q. (By Mr. Cantillon): Mr. Frisone, you are related to the defendant Anthony Frisone?

A. Yes, he's my brother.

Q. Where do you reside?

A. I reside in Encino, California.

Q. What is the address?

A. I just moved there a month ago. I think it's 17930—I have it listed. Do you want me to give it to you?

Q. I think you should.

A. 17930 Rosita Street, Encino.

Q. And what is your business or occupation?

A. I'm area manager for three western states for the [412] Grolier Society.

Q. What is that society?

A. We are the publishers and editors of reference material: Book of Knowledge, Americana, Popular Science, Lands and People.

Q. Does your brother Anthony work with you?

A. Yes, he does.

Q. Now, directing your attention to the Christmas season of 1954, where were you living at that time, if you recall?

(Testimony of Leo Frisone.)

A. The best of my recollection, I believe I was in Phoenix, Arizona; I was living in Phoenix, Arizona.

Q. Now, did you have an occasion during the holiday season to be in the County of Los Angeles?

A. You mean in Los Angeles?

Q. Yes. A. What holiday?

Q. The holiday season of 1954.

A. As a general rule, I made it a point to be in Los Angeles——

Q. Well, were you at that particular time? I'm not talking about any other year than '54.

A. Yes, I was.

Q. And do you remember where you were, Christmas day? A. Yes, I was——

Mr. Jensen: I will object to this as being——

The Court: Pardon me?

Mr. Jensen: Your Honor, I think these questions are immaterial and irrelevant unless they have something to do with the issues of the case, which have gone on for some time now without that showing up, and I will object to it on that ground.

The Court: No; I think it bears on the issues. Overruled. Go ahead.

Q. (By Mr. Cantillon): Would you answer that: Where were you on Christmas of that year?

A. Christmas day, I was at my mother's house in San Bernardino.

Q. Was your brother Anthony there?

A. No, he was not.

(Testimony of Leo Frisone.)

Q. Sometime between—or sometime following that date, did you see your brother Anthony?

A. You mean after Christmas?

Q. After Christmas. A. Yes, I did.

Q. Where did you see him?

A. I saw him at the La Madelon, or this bar or place, La Madelon, on Sunset Boulevard.

Q. And where was he when you saw him there? What was he doing at that time?

A. He was working.

Q. At what? [414] A. He was a bartender.

Q. And what was your purpose in going to see him?

Mr. Jensen: I object to that as being immaterial and irrelevant.

Mr. Cantillon: It's preliminary, your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Cantillon): Well, did you have a conversation with your brother when you saw him? A. Yes, I did.

Q. And what was the subject of that conversation?

Mr. Jensen: I will object to that as being immaterial and irrelevant, and, if exculpatory, it would be self-serving.

The Court: Well, I can't see that the conversation has materiality. If he saw him there, that is material, but the conversation he had with him wouldn't be.

Q. (By Mr. Cantillon): Well, did you see him

(Testimony of Leo Frisone.)

—How long did you stay in Los Angeles over that particular holiday season?

A. You mean when I came in?

Q. Yes. A. I only came in to see him.

Q. Well, did you see him again a few days after you saw him at the La Madelon?

A. Yes, I saw him.

Q. Where did you see him?

A. At my mother's. [415]

Q. And do you remember the date that you saw him out there? A. New Year's Day.

Q. That would be January 1, 1955?

A. Yes, sir.

Q. And was this meeting New Year's Day as a result of some conversation you had with him sometime between, after Christmas and before New Year's? A. Yes.

Mr. Jensen: I will object to that as being irrelevant and immaterial, if the court please.

The Court: Well, we don't need to go into it. Overruled.

All right, go ahead.

Q. (By Mr. Cantillon): Was anyone with him when you saw him at your mother's home in San Bernardino on New Year's Day?

A. You mean when he came?

Q. Yes. Was he accompanied by anybody?

A. No. He was alone.

Q. Are you acquainted with the defendant Nora, your brother's wife? A. Yes, I am.

Q. And do you recall when you first met her?

(Testimony of Leo Frisone.)

A. Well, the best of my recollection—and we were trying to establish this, that is——

Q. I'm just asking you if you recall it. We'll get into [416] that in a minute. Do you recall when the first occasion was that you met her?

A. It was after the—after—I would say it was right around Easter time.

Q. Of what year?

A. I believe, 1955. That would be the time in particular that we speak of; you're talking about January 1st, it's the following Easter.

Q. Let me ask you this: You remember when your brother stood trial in the Federal Court here about a year ago, do you? A. Yes, I do.

Mr. Jensen: Just a moment, please. I lost the question. Might I have that last question read?

(The last question and answer were read.)

Q. (By Mr. Cantillon): Now, you testified at that particular time, did you not?

A. Yes, I did.

Q. Now, prior to that trial, did you have any conversation with your brother on the subject of when he first became acquainted with, or when he first started going with and when he first became intimate with the co-defendant, now his wife, Nora Frisone?

A. Yes, we did. We discussed it at length.

Q. And where did these conversations take place?

A. Well, they took place at my home; they took

(Testimony of Leo Frisone.)
place at [417] his home. We were trying to establish a——

Q. Let me ask you—you've fixed the location: Now tell me what you and your brother said on this subject, and what anyone else said that was present in the conversation, confining it to this particular subject.

A. You mean about the time that he——

Q. He first met his present wife.

A. Well, he felt that——

Mr. Jensen: Just a moment. If the court please, I will object, that it's hearsay and that it's self-serving. I think the fact of the conversation is pertinent. I think otherwise it's immaterial and irrelevant.

The Court: I will sustain the objection. Any statement that the defendant made to him would be immaterial.

Q. (By Mr. Cantillon): Will you state, then, Mr. Frisone, what you stated to your brother on that particular subject at these conversations?

A. Well, I told him that I had no recollection of him ever knowing Nora, he never mentioned her to me, and that I met her at Easter. And my brother and I are comparatively close——

Q. Now, that isn't the question.

A. Well, I'm trying to establish the reasoning——

Q. Well, Mr. Frisone, you can't establish anything. You just tell us what you said to your brother.

(Testimony of Leo Frisone.)

A. Well, that I had met her at Easter time; therefore, he [418] had never made any mention to me about her, and he assumed that he had been going to——

Q. Well, is that about the substance of what you said?

A. Well, you haven't given me a chance to say anything about——

The Court: Well, because that's not material. Only what you said is material.

Q. (By Mr. Cantillon): You've told us generally what you said.

The Court: You've already told us that.

The Witness: Well, I told him that I had met Nora about that time. And I believe that he established the date——

Q. (By Mr. Cantillon): No. We are not asking you what he established.

Is that the substance of what you said? Yes or no. A. You mean at the discussions?

Q. Yes.

A. There were several. At this particular time, I would say, yes. Now, the particular time, I don't know, but at that—what we have reference to.

Mr. Cantillon: I have nothing further.

The Court: All right.

Cross Examination

Q. (By Mr. Jensen): Just one or two questions, Mr. Frisone. [419]

Were you instrumental in securing your brother's present employment? A. Yes, I was.

(Testimony of Leo Frisone.)

Q. Do you have a feeling of looking after him or trying to help him out? A. I have not.

Q. I take it from your testimony that you didn't know these two people were living together in September, October, and November and December of 1954?

The Witness: Would you repeat that again, please?

Mr. Jensen: I will withdraw it and rephrase it.

Q. I take it that you did not know, at the time of these discussions and prior to that other trial that Nora and Anthony had been living together, in September, October, November, and December of 1954?

A. I did not, and I don't believe my brother did, either, at the time we were discussing it.

Mr. Jensen: I have no further questions.

The Court: All right. All right, Mr. Frisone, step down.

All right, call your next witness.

Mr. Cantillon: Mr. Frisone.

ANTHONY FRISONE

a defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as [420] follows:

The Clerk: Your full name?

The Witness: Anthony Frisone.

Direct Examination

Q. (By Mr. Cantillon): Mr. Frisone, I'm going

(Testimony of Anthony Frisone.)
to ask you if you have ever suffered from any mental illness in the past.

Mr. Jensen: I'll object to that as being improper and immaterial and irrelevant, if the court please, and without more foundation——

The Court: I cannot see any bearing upon the issue here.

Mr. Cantillon: Well, I'm going to offer to prove, your Honor, that——

Mr. Jensen: If the court please——

Mr. Cantillon: ——he was treated in the Marine Corps.

The Court: No. We don't want to have any offer of proof. There is no plea of insanity here.

Mr. Cantillon: No, it's not based upon that. It's based upon the subject of an honest belief. Recollection; failure of recollection——

The Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal courts.

Mr. Cantillon: The proposition of his—well, I think I have stated my point. [421]

The Court: All right.

Mr. Cantillon: I have nothing further.

The Court: All right. Step down. [422]

* * * * *

ANTHONY FRISONE

a defendant herein, recalled as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Cantillon): Without going into detail, Mr. Frisone, you testified as alleged in the indictment, at the last trial, and you affirmed it here, that on Christmas night you did not work, that is, Christmas Day night? A. Yes.

The Court: This defendant was a witness before, last week; didn't you put him on last week?

Mr. Cantillon: Yes, I did, your Honor; and I overlooked—and that was one of the reasons I put him back on this morning, and then I——

The Court: I see. All right.

Mr. Cantillon: When your Honor ruled, I just——

The Court: Yes. Go ahead. [423]

Q. (By Mr. Cantillon): How is it that you know that you did not work Christmas Day night of 1954?

A. Because of the records of the Hotel Sahara in Las Vegas, Nevada.

Q. And did you examine those records?

A. Yes, I did.

Q. Did you have a copy of those records made?

A. Yes, I did.

Mr. Jensen: If the court please——

Mr. Cantillon: We will ask that the records I

(Testimony of Anthony Frisone.)
have here, that are stapled, two separate records, one being a registration——

The Clerk: One number or two numbers?

Mr. Cantillon: Two numbers—one being a registration card, No. 9300, of the Hotel Sahara, to be marked defendants' next——

The Clerk: G as in George.

Mr. Cantillon: ——for identificaton.

The Clerk: Defendants' Exhibit G.

(The document referred to was marked as Defendants' Exhibit G for identification.)

Mr. Cantillon: And the statement——

The Clerk: The statement, H.

Mr. Cantillon: ——also numbered 9300, as H for identification. [424]

(The document referred to was marked as Defendants' Exhibit H for identification.)

Mr. Jensen: May I see them, please.

(Documents handed to counsel.)

Q. (By Mr. Cantillon): Do you recall the exact hour that you arrived in Las Vegas and the hour that you left Las Vegas?

A. I don't recall the exact hour.

Q. Let me direct your attention to Defendants' Exhibit G for identification, whereon appears the time, "December 25, 7:12 a.m., '54," and ask you if that refreshes your recollection as to the approximate time you arrived in Las Vegas.

Mr. Jensen: If the court please—I'll withdraw that.

The Court: What is it?

(Testimony of Anthony Frisone.)

Mr. Jensen: I'm sorry, your Honor. I was going to interpose an objection, and I've thought better of it and have withdrawn it.

The Court: All right. Go ahead.

The Witness: Well, I know it was sometime after work, and I was with——

Mr. Jensen: I object to that, your Honor. He is not answering the question.

Q. (By Mr. Cantillon): Did you fly to Las Vegas sometime after work? A. Yes, I did.

Q. Does that refresh your recollection as to about the [425] hour that you arrived there?

A. Yes, it was in the morning sometime.

Q. All right. Now, I show you—do you remember the hour that you left?

A. No. It was in the afternoon sometime.

Q. Well, I show you the statement, Defendants' Exhibit H for identification, and on which appears "December 26th, 4:21 p.m., '54." Does that refresh your recollection as to the approximate time that you left?

A. Yes, it—sometime in the afternoon.

Q. How did you return to Los Angeles?

A. By plane.

Q. And did you work when you came back that night?

A. Yes, I went to work that night.

Mr. Cantillon: Nothing further.

Mr. Jensen: No questions. [426]

* * * * *

The Court: Are there any objections to the in-

structions given or refused? If so, an opportunity will be given to present them to the court outside the hearing of the jury.

Mr. Jensen: None on behalf of the Government, your Honor.

Mr. Michael Cantillon: Yes, your Honor, I have some exceptions to take, and I have a suggestion, your Honor,——

The Court: Let's not do it in the presence of the jury. Ladies and gentlemen of the jury, it is provided in the law that counsel may indicate either objections or omissions, and unless they do that now, they cannot question the ruling. They are required to present requests, and I have been working on them all day yesterday and today, writing and re-writing, and then after this consultation I will indicate to you whether any changes are to be made in the instructions. [473]

Come up here, counsel. We will stand here.

(Thereupon, the following proceedings were had between court and counsel at the bench, outside the hearing of the jury.)

The Court: I worked awfully hard, gentlemen, to try to harmonize them.

Mr. Jensen: I am fully satisfied with the court's instructions.

Mr. Michael Cantillon: If the court please, this is a State case.

The Court: I am not interested in State cases.

Mr. Michael Cantillon: Well, this case is United States v. Shellmire and People v. Von Tiedman,

and I request the court to give the following instruction:

"A rash, negligent, or even reckless belief, though voluntary and conscious, and the supposed truth of the matter, though false in fact, is not, in and of itself, a sufficient criminal intent to support a conviction of perjury."

And I cite People v. Von Tiedman and U. S. v. Shellmire.

The Court: Well, it comes too late. No such instruction was presented to me earlier, and it comes too late now.

Mr. Michael Cantillon: Then I will request the court to give Defendants' Proposed Nos. 14 and 18, and No. 14 states, "To be given if Government's Requested Instruction No. 5 is [474] given."

The Court: I gave it right after. Here it is. I gave it right after 5, because I promised I would give it yesterday.

Mr. Michael Cantillon: Is that towards the end?

Mr. Jensen: Well, I will say, your Honor,—–

The Court: Just a moment. One at a time. Here, it was read, right in the form in which you have it.

Mr. Michael Cantillon: Very well, your Honor. Then I except to the instruction wherein your Honor states that an unqualified statement as to the truth of a matter and false in fact is a sufficient criminal intent to support a conviction of perjury. Could your Honor find that there, so that I could cite it?

The Court: That is modified later on. I will give it to you. You see, I rewrite all of these.

Mr. Michael Cantillon: I see. It was one of the last three or four. Yes, this is it (indicating).

The Court: These two are read together, and you will find that they complement each other.

Mr. Michael Cantillon: I will except to the sixth to the last instruction given by the court.

The Court: Well, the instruction that was given reads as follows:

"An unqualified statement of that which one does not know to be true, and of which he knows himself to [475] be ignorant, is equivalent under the law of perjury to a statement of that which one knows to be false."

Then that was followed immediately by the statement that this does not dispense with the need of proof. It is merely a general statement of the rule, which is further modified by the particular instruction given, and which followed immediately.

Mr. Michael Cantillon: May I have your Honor's comment on No. 18, your Honor,—Defendants' Proposed No. 18.

The Court: I gave that.

Mr. Jensen: He gave it, or it in substance.

Mr. Michael Cantillon: I will except to that.

The Court: Just a minute.

Mr. Michael Cantillon: I will except as not having been given as presented by the defense.

The Court: I have given this one here half a dozen times. Just a minute. I have given this,

and it has been before the Court of Appeals many time in the form in which it was given.

Mr. Michael Cantillon: Very well, your Honor, just so long as my exception is noted.

The Court: Right here I gave it, practically word for word the way you have it, just before the definition.

Mr. Michael Cantillon: Just as long as my exception is noted. [476]

The Court: That is all right. I am just telling you.

Mr. Michael Cantillon: Could this be filed, your Honor?

The Court: It may be. It can't be filed like this, but you can have it copied into the transcript.

Mr. Michael Cantillon: Could she copy my authorities into the transcript, too?

The Court: If you want it.

Mr. Michael Cantillon: Very well, your Honor.

(The citations referred to are as follows:

"People v. Von Tiedman, 1898, 120 Cal. 128; 52 Pacific 155; and

U.S. vs. Shellmire, 370 Fed., Case No. 16271.") [477]

* * * * *

[Endorsed]: Filed October 29, 1958.

[Endorsed]: No. 16238. United States Court of Appeals for the Ninth Circuit. Anthony Frisone, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 3, 1958.

Docketed: November 5, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 16238

United States
Court of Appeals
for the Ninth Circuit.

ANTHONY FRISONE,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

APPELLANT'S OPENING BRIEF

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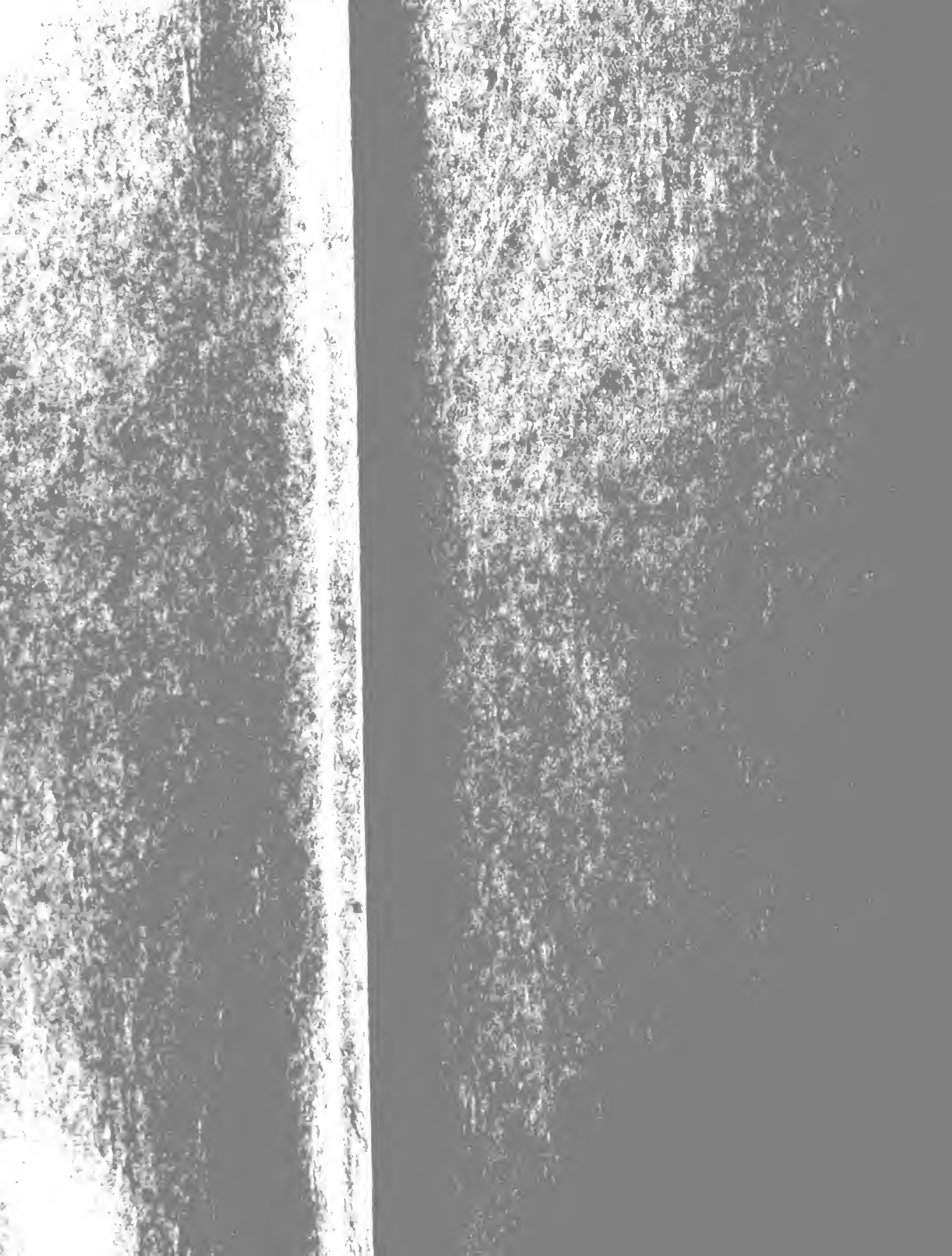

16238

United States Court of Appeals

for the Ninth Circuit.

ANTHONY FRISONE,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

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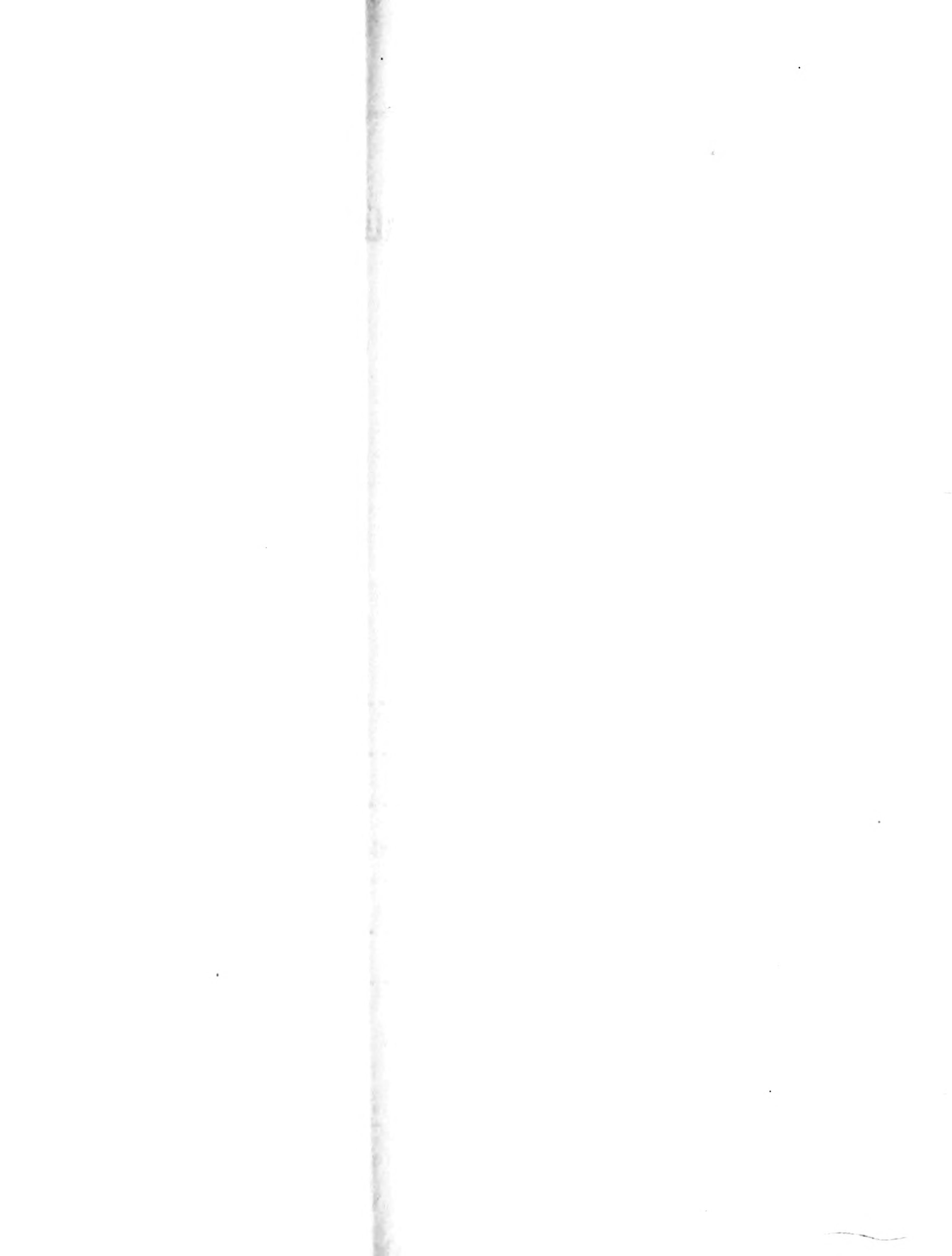

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United States Court of Appeals

for the Ninth Circuit.

ANTHONY FRISONE,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF CASE

The indictment in this case, filed October 30, 1957, charged your appellant, Anthony Frisone, and his wife, Nora Mathis Frisone, collectively in six counts of commission of the crime of perjury (See Tr. of Rec. page 2 to 20), in violation of U. S. C. Title 18, Sec. 1621. The appellant's wife, Nora Mathis Frisone, was named a defendant and charged with perjury in count 1 and 2 of the indictment (See Tr. of Rec. page 3 to page 9).

Your appellant was named as a defendant in count 3, count 4, count 5 and count 6 of the indictment (See Tr. of Rec. page 9 to page 29).

On May 28, 1958 appellant's counsel made a motion for judgment of acquittal as to count 5 which motion was denied, (Tr. of Rec. page 26). On June 3, 1958, at the conclusion of the evidence, appellant's attorney renewed motions to strike count 5 for lack of evidence and also for a directed verdict of acquittal. The motions were denied, (Tr. of Rec. page 29).

Your appellant, Anthony Frisone, on June 4, 1958, was found guilty as to Count Five of the indictment (see transcript of record, page 32 and page 33) by a verdict of the jury.

All other counts in relation to both your appellant as well as to those against the co-defendant, his wife, have been finally disposed of (see transcript of record, page 26, page 32 and page 79).

Your appellant duly and within the time prescribed by law, June 11th, 1958, moved the trial court for a new trial, specifically calling the attention of the trial court to the grievous error herein complained of (see transcript of record, page 70 and page 71).

On June 30th, 1958, after argument, the motion for a new trial was denied (see transcript of record, page 71).

On June 30, 1958, judgment was pronounced upon your appellant and he was committed to the custody of the Attorney General for imprisonment for 18 months (see tran-

script of record, page 78 and page 80).

Your appellant on July 2, 1958, duly filed notice of his appeal to this Honorable Court, (see transcript of record, page 80).

STATEMENT OF FACTS

On the 26th day of March, 1957, a jury trial of your now appellant was commenced in the United States District Court at Los Angeles, before District Judge Ernest A. Tolin (see transcript of record, page 2). The indictment on which that trial was predicated was an asserted violation of Title 18, Section 2421 of the United States Code. In substance, it was there charged that on or about December 27, 1954, Anthony Frisone was guilty of transporting Nora Mathis Frisone, a woman, in foreign commerce for purposes of prostitution (see transcript of record, page 17 and page 18).

During the course of that trial, Anthony Frisone, your appellant, was duly sworn as a witness and gave testimony in his own behalf. (See transcript of record, page 9, page 16, page 17 and page 18). The pertinent portions of that testimony are as follows:

> "Q. Let me ask you this: At the time that this took place in December of 1954, did you know your present wife, Nora at that time?
>
> A. I had met her. I had seen her. I think I had met her. I had seen her.

Q. In December of 1954?

A. Somewhere about that time.

Q. And you would say then that around the first of the year of 1955 your acquaintance with her was casual?

A. No. After the first of the year of 1955 ____ I don't know what the ------- exactly date, but we started going out together.

Q. In mid-December of 1954, did you know your present wife at that time?

A. I was acquainted with her. I had seen her.

Q. Had you ever dated her at that time?

A. No.

Q. Had she ever been in your automobile at that time?

A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took------

Q. Had she been in it while you were with her?

A. No, not while__________"

The foregoing testimony given in Judge Tolin's court was made the basis of the Count Five of the indictment which accuses your appellant of the perjury.

***In the trial at bar before Judge Yankwich on the charge of perjury appellant was asked the following questions and made the following answers, in reference to his testimony given before Judge Ernest A. Tolin:

"Q. Now, you were asked the following questions, to which, Mr. Frisone, you gave the following answers:

Q. Let me ask you this: At the time that this took place in December of 1954, did you know your present wife, Nora, at that time?

A. I had met her. I had seen her. I think I had met her. I had seen her.

Q. In December of 1954.

A. Somewhere about that time.

Q. And would you say then that around the first of the year of 1955 your acquaintance with her was casual?

A. No, After the first of the year of 1955 --- I don't know what the ---- exactly the date, but we started going out together.

Did you give those answers?

A. Yes, I did.

Q. Now, you were asked these questions:

Q. In mid-December of 1954, did you know your present wife at that time?

A. I was acquainted with her. I had seen her.

Q. Had you ever dated her at that time?

A. No.

Q. Had she ever been in your automobile at that time?

A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took----

Q. Had she been in it while you were with her?

A. No, not while------"

Now, are those true answers, ****

Q. (By Mr. Cantillon): You recall all of those questions and answers that I just listed for you?

A. Yes, I recall them.

Q. Now, are the answers true?

A. At the time I gave those answers, I believe them to be true.

Q. Now, you know them to be otherwise at this time?

A. Yes, I know them to be otherwise at this time, for the simple reason that---well, in order to---there is a series of events that leads up to this****

(See Transcript of record, page 142 and page 143).

Q. (By Mr. Cantillon): Whom, other than myself, did you speak to, if you spoke to anyone else, concerning fixing a time for your meetings and becoming intimate with your present wife?

A. Well, I not only spoke to people, ---I spoke to my wife, I spoke to my brother, I read documents there were presented to me in the form of indictments and pretrial--I don't know the correct term for it--allegations, what the District Attorney was going to intend to prove, and different times and dates that he contended that I was somewhere, and we were in complete disagreement--my wife, and myself, and even my brother--so at your suggestion we hired---

The Court: Mrs. Edwards?**********

(See transcript of record, page 146)

Direct Examination

Q. (By Mr. Cantillon): Mr. Frisone, I'm going to ask you if you have ever suffered from any mental illness in the past.

Mr. Jensen: I'll object to that as being improper and immaterial and irrelevant, if the court please, and without more foundation---

The Court: I cannot see any bearing upon the

Mr. Cantillon: Well, I'm going to offer to prove, your Honor, that______

Mr. Jensen: If the court please---

Mr. Cantillon: ----he was treated in the Marine Corps.

The Court: No. We don't want to have any offer of proof. There is no plea of insanity here.

Mr. Cantillon: No, it's not based upon that. It's based upon the subject of an honest belief. Recollection: failure of recollection---

The Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal courts.

Mr. Cantillon: The proposition of his--well, I think I have stated my point.

The Court: All right**********

(See transcript of record, page 168, and page 169)

FIRST ASSIGNMENT OF ERROR

The Court erred in ruling that failure of recollection is not a defense on a plea of not guilty in the Federal Courts to the charge of perjury.

ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR

Your appellant by his testimony given in this case at bar admitted without equivocation that his testimony given during the prior trial in 1957 as to events ocurring back in the year of 1954 was in fact erroneous. It is apparent that the appellant sought to explain this error as an honest mistake resulting from confusion of recollection. Your appellant sought to establish that his ability to

recollect had been impaired by mental illness. The Trial Court ruled such evidence as offered was inadmissible. When counsel for appellant attempted to ellicit such testimony the trial judge ruled as follows:

> "The Court: No, we don't want to have any offer of proof. There is no plea of insanity here."

(See Tr. of Rec. page 169). Counsel for your appellant immediately stated the specific purpose for which the evidence was offered:

> "Mr. Cantillon: No, it's not based upon that. It's based upon the subject of an honest belief. Recollection; failure of recollection---"

The trial court squarely ruled that the evidence offered was not admissible and gave its reason for such a ruling:

> "The Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal Court."

(See Tr. of Rec. page 169).

The quantum of proof that could have been adduced by appellant or its probative persuasiveness must under the rulings of the trial judge always remain unknown factors upon which this court may not speculate.

Count Five of the indictment charged perjury in violation of United States Code, Title 18, Section 1621, which reads as follows:

> "Whoever, having taken an oath before a competent

tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly**** wilfuly and contrary to such oath states any material matter which he does not believe to be true, is guilty of perjury." (Emp. App.)

In U. S. vs. Remington, 191 Fed. (2) 246 at 250 the Appellate Court declared:

> "As already stated the essential issue in a perjury case is whether the accused's oath truly spoke his belief, all else is a contributory issue."

Evidence of appellant's mental illness could have been responsible for appellant's faulty recollection and accounted for an honest though erroneous recitation of past events when appellant was testifying.

Rule 26 - Evidence - Federal Rules of Criminal Procedure declare:

> "The admissibility of evidence and the competency, **** shall be governed, **** by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

A review of the case hereafter cited establishes beyond peradventure that under this rule the evidence offered was admissible and competent and its refusal was prejudicial error.

In the case of U. S. vs. Maurice Rose, (3rd Circuit)

215 Fed (2) 617, the defendant was charged with having committed perjury before the Grand Jury. In a motion filed before trial the defendant asked for the right to inspect his entire testimony previously given before the Grand Jury assigning as his principal reason the fact that he was suffering from diabetes and heart ailment at the time he testified before said Grand Jury and as a result he suffered lapses of memory. This condition considered along with the voluminous character of his testimony made it impossible for him to recall all of such testimony. The defendant's motion was denied on the basis that the Grand Jury records are secret. The Appellate Court in the Rose case concluded the trial judge erred in denying the motion to inspect the Grand Jury records. An inspection of the Grand Jury records under the new rules of procedure is a discriminatory matter in the trial court and that in conformity with the precedent U. S. vs. Remington, (2, Cir.) 191 Fed. (2) 246, the trial judge should have allowed inspection. It was held that the trial court in this Rose case had abused its discretion.

The Appellate Court in so ruling, declared:

> "Furthermore, the rationale of the Remington case is especially applicable, when, as here, the defendant asserted that lapses of memory attributed to his physical condition made it difficult to recall his Grand Jury testimony for the purpose of preparing

his defense." (Emphasis Appellant's)

In the case of State vs. Coyne, 21 L.R.A. (NS) 993 at 997 the Supreme Court of Missouri, a question bearing great identity to the proposition involved in this appeal came up.

In the Coyne case the defendant there was charged with perjury. The defendant during the course of the trial introduced evidence of paresis or partial paralysis affecting his muscular motion, due to a disorder of his central nervous system and that this had so affected his memory that he was known in ordinary transaction of business to forget one day what had occurred the day before or the week before. At the conclusion of the trial the Court instructed the jury as follows:

> "You are instructed that all testimony introduced by the defense for the purpose of showing total or partial insanity of the defendant on October 28, 1907 will be disregarded by you, for the reason that such testimony is insufficient to establish such defense."

The Supreme Court, in holding that giving of such an instruction was in error, went on to say:

> "We think that the court, in ascribing the offer of this evidence to an attempt to prove insanity, either total or partial, misapprehended the purpose of the evidence, and that its instruction in withdrawing it, on that ground, from the jury, was

erroneous. The whole purpose of the testimony, as we view it, was to place the jury in possession of the condition of the defendant's mind at the time of the alleged perjury, and to allow them to say whether the statements of the defendant before the grand jury, that he did not believe or did not recall his statements to Ascher and others, were honest or not, and, if they were honest, then he had not committed perjury. It is not for us to credit or discredit this statement, in view of all the testimony in the case, but it was a question of fact, for the jury to determine. Our conclusion is that the court committed error in excluding this testimony from the jury by its instruction.

Earlier in its opinion this court declared:

"The purpose of the testimony offered, and excluded by the court, was not to establish that the defendant was insane, but that, owing to disease and nervous disturbances, he had evinced a great loss of memory up to April, 1907. <u>This testimony was not for the purpose of showing that he was either wholly or partially unable to appreciate the moral or physical consequences of an act, but to show that his memory was wholly unreliable</u>; and this not by himself, but by other witnesses who had occasion to observe his conduct independent of this charge. We cannot see any reason why it was not competent for the defendant to introduce this testimony as tending to show the jury that, notwithstanding they might believe, beyond all doubt, that he did in fact solicit employment from Ascher and others to aid them in getting their ordinances through, still that, owing to this

failure of memory, he did not recall and did not remember, at the time, these propositions to Asher and others. The indictment and the plea of not guilty tendered the issue to the jury whether the defendant honestly believed, as he stated, or whether honestly he did not recall those visits to Asher and others. "Memory," says Sir William Hamilton, "is the power of retaining knowledge in the mind; the mental power of recognizing past knowledge." That men may do and do have what is denominated unsound memories, although otherwise of sound mind, is a matter of common knowledge. It is most generally observable in persons of old age, who have lost the power to remember past events; but no one would class them as insane persons. That such a person might do an act and be perfectly conscious of it, and of its moral and legal effect, and yet forget it, we take it is not open to dispute. Of course, it would be for the jury to credit or discredit this testimony and believe or not believe it, as it appeared reasonable or unreasonable to them; but the question here is one of competency." (Emphasis App.)

In the case of Leaptrot vs. State, 40 Southern Reporter 616, the defendant there was indicted for perjury. The perjury consisted of false answer given on voir dire examination when called as a juror in a murder case. On the trial for perjury the defendant adduced evidence on his behalf that he was not sound mentally or mentally responsible by the opinion of an ordinary witness. The prosecutor objected to the introduction of this testimony and the

trial court sustained the objection. The Supreme Court of Florida in its decision on reversing the Leaptrot case declared:

> "When we consider that in this case the charge was perjury committed by the defendant "knowingly, falsely, corruptly, willfully, and wickedly," it seems to us that the mental condition of the defendant at the time the alleged false oath was taken, and his physical condition as bearing on the mental, including his powers of memory, were proper subjects of investigation on his trial. It was not necessarily a question of his sanity or insanity. A man may be sane, and yet, by reason of illness or other cause, have a very defective memory." (Emphasis Appellant's)

In the opinion the Court quotes from an old recognized authority on the subject of criminal law:

> "In 2 Bishop's Criminal Law, § 1045, Hawkins is quoted as follows: 'It seemeth that no one ought to be found guilty (of this offense) without clear proof that the false oath alleged against him was taken with some degree of deliberation. For if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever, the most infamous and detestable.' In section 1046, Id., it is said: 'Perjury is committed only where there is the intent to testify falsely.'" (Emphasis Appellant's)

In the case of People vs. Dody, 64 Northeastern Reporter 807 at page 810, the appellate court ruled that the question as to the truth or falsehood of the defense in a perjury case that the defendant at the time he gave such alleged perjurious testimony had been suffering from paresis, which paralyzed his memory, is a question of fact for the jury. The Court of Appeals of New York in its opinion observed:

> "The real defense interposed in behalf of the defendant to the charge of willful and corrupt perjury, and which occupies such a prominent place in the record, was that, at the time when the testimony was given now charged to be false, he was, and had for some time been, suffering from paresis, or some similar mental disease, that paralyzed his memory to such an extent that he could not be held responsible for his answers to the questions propounded to him upon the trial. It is not necessary in this court to say much in regard to that defense. It is quite sufficient to observe that it presented a question of fact that was fully and fairly tried before the jury. The evidence bearing upon it consisting in part of the opinions of experts, was submitted to the jury, and the verdict must be regarded as the fair and deliberate judgment of the body which, under our system of jurisprudence, is organized to determine matters of fact, that it was without merit. Of course, it is possible that a person may be suddenly afflicted with a mental disease that completely prostrates all of his intellectual faculties, but whether that claim was true or false in this case was a question for the jury." (Emphasis Appellant's)

The above cited and quoted from cases indicate the principle of common law controlling the question at hand and manner in which that principle has been interpreted by the Courts of the United States in the light of reason and experience.

It establishes beyond a shadow of a doubt the evidence offered at the trial on behalf of appellant was competent and should have been admitted by the trial court.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT WAS IN ERROR IN REFUSING THE APPELLANT THE OPPORTUNITY TO MAKE AN OFFER OF PROOF AFTER SUSTAINING THE GOVERNMENT'S GENERAL OBJECTION TO A QUESTION SEEKING TO ELICIT COMPETENT, RELEVANT AND MATERIAL EVIDENCE.

The Court refused to permit the appellant's counsel to make an offer of proof after the Court had sustained the government's objection to a question embracing the subject of appellant's mental illness, (See Tr. of Rec. page 169).

This Honorable Court has previously held that a trial judge is never justified in refusing a defendant the opportunity to make an offer of proof except where every conceivable answer to the question would be inadmissible, D-Aquino vs. U. S. (9th Cir.) 192 Fed (2) 338.

The error complained of in this second assignment is so interlaced with the first assignment that argument would of necessity be repetitious. Appellant is constrained

to submit this proposition without further worrying the point.

CONCLUSION

The prejudicial aspect of the rulings of the trial court are apparent. The trial court by sustaining the government's objection to the question seeking to elicit evidence of mental illness shut off all proof on a phase of the issue as to whether appellant entertained an honest though erroneous belief in the truth of his testimony at the time he gave it. If the appellant could have convinced the jury he honestly believed he was testifying truthfully at the time in question, he was entitled to an acquittal. As the authorities all relate evidence of mental illness is competent on the subject of honest belief. The refusal of the right to adduce evidence on this subject constituted reversible error. The error stands magnified in the light of the circumstance that after several hours of deliberation the jury notified the Court in writing that it was then impossible for them to reach an agreement on the question of appellant's guilt on any of the five counts which they were then considering. (See Tr. of Rec. page 31).

The principle where the facts of the case are such that the appellate court cannot say that if the evidence erroneously excluded had been admitted, the jury would have returned the same verdict, the exclusion of such evidence

should be held to be reversible error. (Crawford vs. U. S. 212 U.S. 183.) has full application in your appellant's case.

Appellant, for the reasons set forth in this brief, respectfully requests this Honorable Court grant reversal.

Respectfully submitted,

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Attorneys for Appellant

No. 16238

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTHONY FRISONE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED
MAY 19 1959
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 16238

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTHONY FRISONE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, which adjudged appellant guilty on Count Five of an Indictment returned in said District, which count charged the appellant with committing perjury in violation of the provisions of Title 18, Section 1621, United States Code. [R. 3-20, 78-80.]

The jurisdiction of the District Court is based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain an appeal and review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

In March 1957 the appellant was brought to trial on a charge of transporting a woman in interstate commerce for immoral purposes. [Rep. Tr. pp. 18-21; Ex. 1.]* He took the stand and testified in his own behalf. Nora Mathis Frisone, his wife, also testified in this trial. [Exs. 6A and 6B; Rep. Tr. pp. 215-228.]

The charge in the instant case is the alleged false testimony given in said Mann Act case. The Indictment here is in six counts. [R. 4-20.] Counts One and Two pertain to testimony of Nora Mathis Frisone. Counts Three through Six pertain to testimony of the appellant. The trial court dismissed Count Six at the close of the government's case. [R. 23-26.] The jury returned a verdict acquitting co-defendant Nora Mathis Frisone on Count Two, convicting the appellant on Count Five and disagreed on all other Counts [R. 32-33] as to both defendants below. A mistrial was declared as to the unresolved Counts and the government subsequently dismissed them. [R. 71-72.]

After the verdict convicting appellant on Count Five, he moved for a new trial [R. 70-71] which was denied. [R. 71.] The appellant was sentenced to eighteen months in the custody of the Attorney General of the United States and the appellant brought this appeal. [R. 78-80.]

---

*Reference to the unprinted portions of the reporter's transcript are so designated herein; the printed record is denoted simply "R" followed by the page.

Statement of Points on Appeal.

Appellant's sole point, as finally briefed on this appeal, is that the trial court committed prejudicial error in ruling upon the admissibility of certain evidence at the trial of this cause.

Only a single instance of the trial court's so acting is sought to be reviewed as error. Appellee herein discusses various aspects of the trial court's ruling as separate points in its argument.

Statement of Facts.

At the trial wherein the questioned testimony was given the appellant was charged with transporting Nora Mathis Frisone [therein referred to as "Paula Frisone," see Ex. 1] to Mexico for purposes of prostitution. *The offense was alleged to have occurred on or about December 27, 1954.* [Ex. 1.]

Appellant and Nora Mathis Frisone testified in said trial, and the defenses there made were several, among which was the contention, testified to by both, that they were just acquainted with each other at the time alleged for said offense, that their relationship at that time was "casual" and *that a more intimate relationship did not develop until January of 1955* [Rep. Tr. pp. 216-217, 224-226]. The appellant testified that they did not go out together or date each other *until after the first of the year 1955.* [Rep. Tr. pp. 224-225.] It is to be noted that by stipulation and these record references the quoted testimony of this indictment is that given on the first trial. [Rep. Tr. pp. 214-215.]

The alleged false statements of the appellant in this last regard are set forth in Count Five of the Indictment [R. 16-17] reproduced in pertinent part in the Appendix.

At the trial of the within cause Inga Constance Smith testified that she lived with her husband at 7538 Lexington Avenue, Hollywood; that they have adjoining premises for rent at 7540 Lexington Avenue; and *that the Frisones jointly occupied these premises as man and wife during the period of September 1954 to January 1955* and that the light and gas for the rented premises were separately metered. [R. 83-86.]

Benjamin Smith testified to like effect in respect to the Frisones living together at these premises from September 1954 through the holidays. [R. 91-92.]

Southern California Edison Company records for electricity were produced for 7540 Lexington Avenue, Hollywood, and they showed that a request for power was made by Mrs. Frisone on September 7, 1954, that the "On Order" bears the name of Anthony Frisone and that service was so rendered through to January 1955. [R. 93-96; Ex. 4, received in evidence Rep. Tr. p. 174.]

Southern California Gas Company records for 7540 Lexington Avenue show service rendered from September 1954 to January 1955 and are in the name "N. Frisone." [R. 97-99; Ex. 5, received in evidence Rep. Tr. p. 174.]

Nora Mathis Frisone was called to the stand before the appellant was and testified in this cause that *before* the earlier trial the question was raised as to when she and ap-

pellant began their intimate relationship [R. 119] and that she discussed this with appellant and they were unable to come to an agreement as to the date, but that her husband believed it to be before the incident in Mexico. [R. 120-121.]

She further testified that an investigator had been sent to the Smith's to determine when they had lived on Lexington Avenue [R. 119, 130-131; see also: R. 132-134], and they were told that the Smiths' had no records and could not recall the date. [R. 130-131.]

It is to be noted that the trial court permitted extensive testimony as to the state of this witness's recollection as to the period of the earlier trial [R. 116-117, 118, 121, 123], all in relation to a substantially identical count to the one on which appellant was convicted.

The appellant was called to the stand several different times in his own defense. [R. 135, 168, 170.] On the first of these occasions he was read the testimony quoted in Count Five and he stated he believed it to be true at the time he gave it, but now knew it to be false *because of the light and gas records.* [R. 142-143.]

The appellant was then asked a long series of questions as to why he had so testified. [R. 143-148, 154-155, 160.]

The entire substance of his testimony in respect to this subject was to the effect that *he was aware before the first trial* that he had no recollection of when he had commenced living with his wife, Nora Frisone. [R. 143 *et seq.*]

He testified that at the time of the first trial he was trying to establish the date when he started living with

his wife [R. 143]; that he discussed this subject with a number of other people [R. 143-144, 146-147]; that he was misled by papers served on him by the prosecutor [R. 146, 147]; that he hired an investigator to check with the Smiths' and in considering her report believed the winter of 1954-1955 to be the time he lived on Lexington Avenue [R. 146, 154-155], but that from his own recollection he could not remember when he had first lived with his wife. [R. 155.]

It is to be noted that no such qualifications were included in his testimony at the first trial [Rep. Tr. pp. 224-225, which is the language quoted in Count V, reproduced in the Appendix.]

The above testimony of the appellant was concluded on May 29, 1958. On June 3, 1958, several other witnesses for the defense having been called in the one intervening day of trial [Rep. Tr. pp. 393, 395 and 421], the appellant was recalled to the stand and the following transpired. [R. 168-169]:

"Direct Examination

"Q. (By Mr. Cantillon): Mr. Frisone, I'm going to ask you if you have ever suffered from any mental illness in the past.

Mr. Jensen: I'll object to that as being improper and immaterial and irrelevant, if the court please, and without more foundation—

The Court: I cannot see any bearing upon the issue here.

Mr. Cantillon: Well, I'm going to offer to prove, your Honor, that—

Mr. Jensen: If the court please—

Mr. Cantillon: —he was treated in the Marine Corps.

The Court: No. We dont' want to have any offer of proof. There is no plea of insanity here.

Mr. Cantillon: No, it's not based upon that. It's based upon the subject of an honest belief. Recollection; failure of recollection—

The Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal courts.

Mr. Cantillon: The proposition of his—well, I think I have stated my point. [421]

The Court: All right.

Mr. Cantillon: I have nothing further.

The Court: All right. Step down. [422]."

The foregoing statement of facts have been made rather extensive to put this matter in proper sequence and context and to avoid any misconception which may be created by the brief of appellant at pages 5, 6 and 7 where it would appear that the questioned ruling occurred during a continuous examination of the appellant, precluding him from giving a full explanation.

ARGUMENT.

The Court did not commit prejudicial error in its rulings or remarks in excluding certain testimony tendered by the Appellant. (Appellant's points I and II.)

A. The substance of the proffered testimony was shown to the court and no prejudice accrued to appellant by reason of his being precluded from going into details.

B. The rulings on the proposed evidence were proper.

C. The court's remarks relative to failure of recollection as a defense to perjury were not misunderstood and were harmless.

A. The Substance of the Proffered Testimony Was Shown to the Court and No Prejudice Accrued to Appellant by Reason of His Being Precluded From Going Into Details.

Appellant complains that after receiving an adverse ruling, as shown above in the statement of facts, that he was blocked from showing the admissibility of the evidence by an offer of proof.

Three aspects of the evidence intended to be introduced are clearly shown: First, that appellant had suffered from a mental illness in the past, second, that he was treated for this in the Marine Corps, third, that it has affected his powers of recollection or caused him failure of recollection. [R. 168-169.]

Certainly this is the overall substance of what was intended to be shown. Considered individually or collectively there is a sufficient offer for the court to rule and for this court to review. It has been said:

> ". . . But a formal offer of proof is not necessary where the record shows either from the form of

the question asked or otherwise what the substance of the proposed evidence is."

D' Aquino v. United States (9th Cir., 1951), 192 F. 2d 338 at 374.

Furthermore, the court is fully justified in stopping counsel out of hand where an offer is being attempted in the presence of the jury.

> "The court very properly refused to permit appellant's attorney to state what he proposed to prove in the presence of the jury. Nor was it necessary to excuse the jury and delay the trial to permit the offer to be dictated to the reporter."

Shreve v. United States (9th Cir., 1939), 103 F. 2d 796 at 806-807.

To the same effect see:

People v. Francis (Calif. Dist. Ct. of Appeal), 319 P. 2d 103 at 107,

where it was held that it is not error to refuse an offer where no request is made to take such offer out of the hearing of the jury.

Counsel should have asked to approach the bench. He had been afforded this opportunity earlier in the trial. Furthermore, he was *cautioned at that earlier time not to state his offer in the presence of the jury*—a factor he completely ignored on the questioned occasion. [R. 107.]

It is apparent from the record that both prosecutor and court were attempting to prevent the offer occurring in the presence of the jury. [R. 169.]

B. The Rulings on the Proposed Evidence Were Proper.

A witness may not testify to his own mental illness or his own unsoundness of mind.

The leading case on this subject appears to be:

> *O'Connell v. Beecher* (App. Div. of Sup. Ct. of N. Y., 1897), 21 App. Div. 298, 47 N. Y. Supp. 334,

where it was said:

> ". . . Plaintiff was permitted to testify that . . . he fell from a building and was severely injured. This was competent. But he was further permitted to testify that for eight or nine years thereafter his mind was not right. . . . This was error. The witness was not an expert and was not competent to give an opinion upon this question."

The above case was cited with approval in a murder case, where it was said:

> "For obvious reasons under the circumstances of this case, the witness should not be permitted to testify to his own insanity, *or such acts from which insanity might be inferred.* It would open the door to a very wide field into which much fraud, dishonesty, and perjury may creep, *to say nothing of the ability of the witness to judge of the matter.*" (Italics added.)
>
> *Commonwealth v. Dale* (Sup. Ct. of Pennsylvania 1919), 107 Atl. 743.

In another murder case it was held:

> ". . . the defendant cannot be permitted to testify to his own mental unsoundness and the State's objection to this line of testimony was properly sustained."
>
> *George v. State* (Sup. Ct. of Alabama 1941), 200 So. 602 at 607.

In accord:

> *State v. Riggle* (Sup. Ct. of Wyo. 1956), 298 P. 2d 349 at 361.

The Federal rule is the same.

> *Piquett v. United States* (7th Cir., 1936), 81 F. 2d 75 at 81, cert. den. 298 U. S. 664.

Appellant cites three cases on this subject matter. None of the three hold that a witness or a defendant may testify as to his own unsoundness of mind.

In *State v. Coyne* (Missouri Sup. Ct. 1908), 214 Mo. 344, 114 S. W. 8, the court specifically pointed out that the proposed testimony was not offered from the defendant himself. In the case of *Leaptrot v. State* (Sup. Ct. of Florida 1906), 51 Fla. 57, 40 So. 616 at 617, appellant misquotes the case. It does not hold that the refusal of testimony on this subject was error. At page 618 the court states that the offer as to defendant's "change of mental condition" at time of false swearing and that defendant was not "strong or sound mentally" and was "not mentally responsible" was properly refused, because it was not "simply to show a failing condition of mind and memory upon the part of the defendant." (See p. 618 of 40 Southern Reports.) As to the admissible portion, it is to be noted that the defendant was not offered so to testify himself.

In *People v. Doody* (Court of Appeals of N. Y. 1902), 172 N. Y. 165, 64 N. E. 807 at 809-810 the court points out that experts testified. It is not shown whether the defendant did or did not.

Counsel for appellee have made a diligent search of all American cases and have not found any decision approving the defendant's being permitted to testify to his own "mental illness," mental unsoundness or mental disease, let alone a case where the refusal to take such testimony was held error.

Analyzing the proposed evidence, it becomes apparent that the ultimate purpose was to show that the residual effect of the "mental illness" was a poor memory, lack of memory or some similar defect. See comments of counsel to this effect on hearing for new trial set forth in the Appendix. Any other purposes would lack materiality.

It has been held that such causal connection between disease and defect is exclusively for expert opinion and that the jury should not be permitted to infer such connection without expert opinion on the subject.

> *Spivey v. Atteberry* (Sup. Ct. of Okla. 1951), 238 P. 2d 814.

And to evaluate symptoms and determine illness is for experts in this field of science.

> *Spivey v. Atteberry, supra;*
>
> *Wigmore on Evidence* 3rd Ed., Vol. VII, Section 1975, p. 118 *et seq.;*
>
> *Wigmore on Evidence,* 3rd Ed., Vol. II, Section 568, p. 660 *et seq.*

Nor can a lay witness, party to the suit or not, testify regarding the subject of his "treatment."

"Appellee testified that he was treated in the Veteran's Hospital for amebiasis. This was either hearsay or opinion testimony on a subject concerning which appellee was not qualified to express an opinion."

United States v. McCreary (9th Cir., 1939), 105 F. 2d 297 at 299.

Accord:

McConnell v. United States (3rd Cir., 1936), 81 F. 2d 639 at 640.

We do not wish to be misunderstood in the foregoing argument. Subject to certain tests and qualifications, lay witnesses may testify to external appearances or even as to how they "feel," etc.

Wigmore on Evidence, 3rd Ed., Vol. VII, Section 1974, p. 113 *et seq.*

But this clearly was not the purpose of the proposed testimony. Insofar as the appellant might have testified to poor memory or failure of recollection alone, not as a result of some disease, the evidence would probably be admissible.

No such question was put to the appellant on this subject during the incident under consideration.

Where admissible and inadmissible evidence are offered together the court may properly reject all.

Leaptrot v. State (Sup. Ct. of Fla. 1906), 40 So. 616 at 618;

McDuffie v. United States (5th Cir., 1915), 227 Fed. 961 at 965;

Huntington v. United States (8th Cir., 1909), 175 Fed. 950.

In any event, the appellant had testified at great length on the state of his recollection and poor memory at an earlier session of this trial. This testimony is set out at some length below, in the next subheading to this Argument.

As to this last aspect of the evidence proposed, the failing memory, even if this court concludes that such evidence was excluded on this occasion and it was error so to do, such error could not be prejudicial to the appellant in the light of his prior testimony on this point.

It is uniformly held that such an error, if error there be, is cured by admission of other evidence of the same facts.

> *Barshop v. United States* (5th Cir., 1951), 192 F. 2d 699 at 701;
>
> *Finn v. United States* (9th Cir. 1955), 219 F. 2d 894, 901;
>
> *Furlong v. United States* (8th Cir. 1926), 10 F. 2d 492, 494;
>
> *DeCamp v. United States* (D. C. Cir., 1926), 10 F. 2d 984, 985;
>
> *Strada v. United States* (9th Cir., 1922), 281 Fed. 143;
>
> Fed. Rules Crim. Proc. 52(a).

C. The Court's Remarks Relative to Failure of Recollection as a Defense to Perjury Were Not Misunderstood and Were Harmless.

Obviously the court did not mean its remarks [R. 169] to be taken as broadly as stated, nor is there any reason to suppose that at that time, in the trial, counsel for defense misconstrued what was said. This is shown by (1) the testimony theretofore taken, (2) the instructions given by

the court, and (3) the courts statements on the hearing of the motion for new trial.

In the first place a great deal of testimony had already been introduced on the defendants' recollections. The appellant himself had testified at great length about his inability to remember or accurately recall the beginning of intimacy with his wife. No attempt theretofore, by court or prosecutor, was made to inhibit or restrict the appellant's *own observations* of the state of his mind as it affected his ability to recollect events in their proper sequence. And the fullest opportunities were given to the appellant to give every reason or cause including poor memory that he might have had for having testified to matters which were in fact false.

Consider the following examples of questions, giving the widest latitude for explanation, put to the appellant while earlier on the stand and his answers as to his failure of recollection:

Direct examination:

> "Q. Now, why did you believe these statements to be true at the time that you made them? A. Because at the time that I made those statements I was under indictment, and I was to appear in court here on a previous trial, and I was trying to establish time; in other words, to find out when I had started living with my present wife, when our acquaintance began, where we had lived, when we became intimate, and several other different things.
>
> Q. Now, with whom did you discuss, if you discussed with anyone,—strike that.
>
> Did you talk to anybody at all in attempting to fix this time? A. Yes, I did. I talked to several people.

Q. Did you talk to me? A. Yes, I talked to you." [R. 143-144.]

* * * * * * * *

"Q. (By Mr. Cantillon): Whom, other than myself, did you speak to, if you spoke to anyone else, concerning fixing a time for your meeting and becoming intimate with your present wife? A. Well, I not only spoke to people,—I spoke to my wife, I spoke to my brother, I read documents there were presented to me in the form of indictments and pre-trial—I don't know the correct term for it—allegations, what the District Attorney was going to intend to prove, and different times and dates that he contended that I was somewhere, and we were in complete disagreement—my wife, and myself, and even my brother—so at your suggestion we hired—

The Court: Mrs. Edwards?

The Witness:—Mrs. Edwards to go out and try to establish the correct time that I had lived with my present wife on Lexington Avenue.

This she did, and came back and talked to me about it, and told me what Mr. and Mrs. Smith had told her.

From this, from talking to my wife, and from talking to my brother, from trying to put events in their proper places, and reading different material, this is how it came about.

Q. (By Mr. Cantillon): Whom did you talk to, other than your wife, and your brother, and Mrs. Edwards? Name the other people. A. Well, I talked to Leola Gerson, I talked to George Redman, I talked to Rudy, I talked to Paul Mandell—no, I take that back. Not at the time I never talked to

Paul Mandell, because he wasn't even here. I talked to another girl, Shirley Von Shenk, who was a waitress at the La Madelon.

I talked to several other bartenders who were at the La Madelon at the same time that I was. In other words, in my own mind I made a sincere effort to establish time and place.

I knew that I—the first place that I lived with my wife was the first time that I became real intimate with her." [R. 146-147.]

* * * * * * * *

"The Court: Did I understand you to say that you didn't remember that you had gas and lights in the place until the records were produced here?

The Witness: I honestly did not remember, your Honor, because I must have lived—I always lived in a furnished apartment. Generally the lights and the gas are provided and figure in the amount of the rent.

Well, since 1954 I venture to say I have lived in almost—especially the last year, because I have been traveling for this company, in over a hundred places. That is quite a lot of moves." [R. 148.]

* * * * * * * *

By Mr. Jensen:

"Q. Would you explain to me, Mr. Frisone, how you expected other people to recall when you became intimate with your wife, and couldn't remember your own intimacy with her as to the date? A. To the best of my knowledge,—you are asking me to recall, is that right?

Q. No, I am asking you why you thought other people would recall it better than you. A. Well, because I was not definite in my own mind.

Q. You were the man who was intimate with her, weren't you? A. I have been intimate with a lot of girls besides my wife, before I met her.

Q. Did you ever live with any of them for four months? A. Possibly longer.

Q. I take it, you felt satisfied when Mrs. Edwards told you that you could have lived with the Smiths in 1953, 1954 or 1955,—you felt satisfied on the basis of that information to come in here and testify that your intimacy did not commence with your wife until 1955? A. I wasn't satisfied.

Q. Why did you so testify, then? A. Well, because, due to the fact that the indictment which was handed me was marked in 1953 and 1954, which states these times.

I knew I hadn't been, to the best of my knowledge at the time of the trial, I hadn't been in Los Angeles in 1953. If I had, it had only been periodic, for a day or two in and out, or for a visit. I won't say for sure, and that is still a long time to be able to be positive.

In 1954 some time I started working at the La Madelon. Previous to working at the La Madelon, I believe I lived in San Bernardino or Las Vegas.

Now, when she mentioned winter, that was brought out by Mrs. Smith to me, there was only one winter which I was here, which could have been '54-'55. That along with my wife—talking to my wife, and talking to my brother, and talking to Mrs. Gerson, and talking to several other people is how I established those facts in my own mind, and up until those records were presented here, I firmly believed in my own mind that what I said was true at the trial,

and up until yesterday or the day before I still held it to be true. Since then I have found out I am in error.

Q. I take it, then, since yesterday or the day before, when the Government introduced that testimony, you couldn't of your own recollection recall within four months when you started living with your present wife? A. No." [R. 154-155.]

* * * * * * * *

"Recross Examination

"Q. (By Mr. Jensen): Mr. Frisone, how is it you can remember the details and the dates on the financial arrangements and the ownership of the La Madelon, and all the bartenders that were there, and you couldn't remember the date that you first started living with your wife? A. I didn't recall any specific dates of the financial arrangements.

Q. Didn't you state that the ownership transferred in August? A. I said it was sold a couple of times, I believe once in August, while I was work there, which was one period of time. I had been going with my wife for a long time before I even married her, which was an on and off romance.

Mr. Jensen: I have nothing further." [R. 160.]

The trial court recognized generally, that failure of recollection is a defense. In this respect, the appellate court's attention is invited to the instructions on this subject given by the court only a day later [R. 28-29], particularly the following:

"A false answer purposely made cannot be said to have been wilfully made if it was made by or through

surprise, mistake or inadvertence or if the false answers were made through forgetfulness or through a poor or mistaken recollection of facts." [R. 46.]

Surely, the court's remarks in question must be considered in the posture of the case at the time they were made and it should be kept in mind that the appellant had already testified in this case that *before his testimony in the prior trial* he recognized his own inability to recall the time sequence in question.

What the trial court had in mind in making this remark was: *A failure of recollection, recognized by a witness to exist at the time or before the false testimony is given is not a defense to a charge of perjury.*

Instructions to this effect were submitted by the Government and *served upon defense counsel* [R. 51, Requested Instruction 5] at the *begining of trial* [Rep. Tr. p. 11] and were later given to the jury. They are not questioned on this appeal and are the law of this case, clearly applicable to these facts. We quote the instruction given:

> "An unqualified statement of that which one does not know to be true, and of which he knows himself to be ignorant, is equivalent under the law of perjury to a statement of that which one knows to be false." [R. 45.]
>
> * * * * * * * *
>
> "A defendant charged with perjury, who during the course of the trial of another cause, affirmed the existence of a fact which he did not know to be true and about which he knew himself to be ignorant, is not guilty of perjury if an analysis of his entire testimony relative to such fact creates a reasonable doubt as to whether he intended to qualify his testi-

mony and convey, to those before whom his testimony was given, a belief that some uncertainty existed in his own mind relative to the truth of the fact affirmed." [R. 46.]

This rule in respect to perjury is incorporated in the statutes of California.

Section 125, Calif. Penal Code, enacted 1872.

It is proper for a court to give such instructions.

20 Cal. Jur., Section 7, at p. 1012;

People v. Von Tiedman (Sup. Ct. of Calif. 1898), 52 Pac. 155 at 158;

People v. Senegram (Cal. Dist. Ct. of Appeal 1915), 149 Pac. 786 at 787;

Cf. Butler v. McKey (9th Cir., 1943), 138 Fed. 373 at 377.

That the court understood the defense position to be that the appellant had no memory of the event but had made a good faith effort to determine the dates involved and was wrong as to his conclusion and testimony thereon is shown by his discussion with counsel at the hearing for new trial (see appendix) and the court correctly interpreted the situation when he commented to the effect that in this posture of events, evidence of the appellant's treatment is immaterial. We quote:

"Mr. Cantillon: Of course, he can testify that he suffered lapses of memory.

The Court: He explained it in another way. When a man defends it as correct, and only changes it when he is confronted with written testimony—well, any testimony that he was treated by the Marine Corps is not material." [Rep. Tr. p. 514.]

In any event, the extent to which a court's ruling is going to be applied to the introduction of evidence can only be determined by asking another question.

The plain fact of the matter at hand is that counsel never asked another question which pertained to the appellant's state of mind or the operation of his memory. What the court's ruling might have been as to such a question in this field is speculative except to the extent he had specifically accepted or rejected evidence on the subject before.

Further it is interesting to note that the appellant's counsel did not persist at all towards making a showing that *anything other than the appellant's treatment in the Marine Corps* was involved. Counsel had no such reluctance earlier in the trial about persuading the court to hear his position on admissibility of evidence. For an example of his extreme persistence, and success in the face of the court's initial adverse reaction, see R. 104-108.

This is doubly meaningful when it is borne in mind that this incident occurred on the recall of the appellant to the stand after extensive evidence had been taken from him, direct, cross, re-direct, and re-cross—all on the *reasons why the appellant had formerly testified as he had.*

Considering all of the foregoing, together with counsel's remark at the conclusion of the incident [R. 169], and the failure of the defense to come forward with a qualified medical witness or competent military or medical records as to the nature of appellant's treatment, one wonders if the "point made," to all present, was not the appellant's service in the Marine Corps.

The court's remarks in this respect at the Motion for New Trial are pertinent:

> "The Court: You didn't produce an expert to testify that he was suffering from a malady. All you were going to have him testify to was that he was treated by the Marine Corps." (See Appendix.)

We anticipate that counsel will contend that he need not fly in the face of such a statement by the court. This assumes, of course, that the court's remark was a clear cut ruling on the subject. In examining the language used it would appear to be in the nature of "thinking out loud." It is certainly equivocal and not by any means as incisive as rulings made on evidence at earlier points in the record. Compare the court's rulings in the record at pages 105-107 with the court's statement at R. 169.

We quote the latter:

> *"Well, I don't think* failure of recollection is a defense on a plea of not guilty in the Federal courts." (Emphasis added.)

The court's specific ruling in these premises was not and should not be construed to be anything more than a ruling that the appellant could not testify to his mental illness or to treatment received by him for mental illness while he was in the Marine Corps. And this, as we have shown before, was a proper ruling within the sound discretion of the court.

Conclusion.

Appellant cites *Crawford v. United States,* 212 U. S. 183 (1909), in his conclusion that he was prejudiced by the exclusions from the evidence. That case is an extremely harsh one, not on a par with case at hand, for there a defendant was precluded in all respects from answering evidence adduced by the prosecution. Furthermore, there, the tendered evidence was held clearly admissible.

Here all admissible evidence offered by the defense was received and many opportunities were given the appellant to testify further on the subject of his recollection or the operation of his memory.

The court's rulings were proper, his remarks were harmless and the appellant had the fullest opportunity to put forth his defense. The judgment should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

APPENDIX A

Hearing on Motion for New Trial.

(Reporter's Transcript, pages 513-515)

The Court: Gentlemen, I have read the affidavit and the memorandum which has just been filed, and if you want to add anything to it, Mr. Cantillon, you may.

Mr. Cantillon: Very well, your Honor. I am particularly directing the court's attention to the portions of the transcript which are recited in the memorandum.

The Court: Yes, I am familiar with them.

Mr. Cantillon: I think, your Honor, under the law, there is no question but that the evidence was relevant. The court would not permit me to make the offer of proof, although I did confine the—in an effort to make an offer of proof I did set forth the particular issues about which I did want to make the offer.

The Court: An offer of proof is only necessary if what you are trying to show is not evident. What you were trying to show by your questioning was that he was treated for a mental condition, which had nothing to do with perjury, and I knew what it was, so your offer of proof does not mean anything.

Mr. Cantillon: Your Honor, here is the one count upon which the man admitted falsehood. He stated that the falsehood was made by him as the result of having an honest failure of recollection.

He testified at some length as to how he attempted to refresh his recollection prior to the time he gave his prior testimony.

Now, to say a person's mental condition is not relevant on the subject of recollection is just not true.

The Court: You didn't produce an expert to testify that he was suffering from a malady. All you were going to have him testify to was that he was treated by the Marine Corps.

Mr. Cantillon: No, your Honor, that was not the extent of it. Your Honor interrupted me while I was in the process of making that statement, and said, "No, we don't want any offer."

The Court: You didn't bring in an expert to testify as to his condition. A man can't testify as to his mental condition.

Mr. Cantillon: Of course, he can testify that he suffered lapses of memory.

The Court: He explained it in another way. When a man defends it as correct, and only changes it when he is confronted with written testimony,—well, any testimony that he was treated by the Marine Corps is not material. I will stand by the ruling. You can go and try to get the Court of Appeals to overrule me. If that is all you have, I am ready to rule on the motion.

APPENDIX B.

The Indictment.

(In pertinent part)

COUNT FIVE
[U.S.C., Title 18, Sec. 1621]

I.

The grand jury incorporates by reference thereto and realleges as if set forth herein in full all the allegations in Paragraph I of Count One of this indictment and all the allegations in Paragraph II of Count Three of this indictment.

II.

And the grand jury further alleges that said defendant Anthony Frisone further testified at the time and place aforesaid, and under the circumstances aforesaid, as follows:

"Q. Let me ask you this: At the time that this took place in December of 1954, did you know your present wife, Nora, at that time?

A. I had met her. I had seen her. I think I had met her. I had seen her.

Q. In December of 1954?

A. Somewhere about that time.

Q. And you would say then that around the first of the year of 1955 your acquaintance with her was casual?

A. No. After the first of the year of 1955—I don't know what the—exactly the date, but we started going out together." [Reporter's transcript, page 138.]

* * * * * * * * *

"Q. In mid-December of 1954, did you know your present wife at that time?

A. I was acquainted with her. I had seen her.

Q. Had you ever dated her at that time?

A. No.

Q. Had she ever been in your automobile at that time?

A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took—

Q. Had she been in it while you were with her?

A. No, not while—" [Reporter's Transcript, page 140.]

III.

In truth and in fact, as the defendant Anthony Frisone well knew at the time of his so testifying, the said Anthony Frisone knew and was well acquainted with the defendant Nora Mathis Frisone in the summer of 1954, he having been frequently in her company during the summer of 1954 and during the said period they met and accompanied each other on social occasions; and that on or about September 17, 1954, said defendants Anthony Frisone and Nora Mathis Frisone lived together in Los Angeles, California, as man and wife, continuing to live thereafter in such relationship for the remainder of the year of 1954.

No. 16238

United States Court of Appeals

for the Ninth Circuit.

ANTHONY FRISONE,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S CLOSING BRIEF

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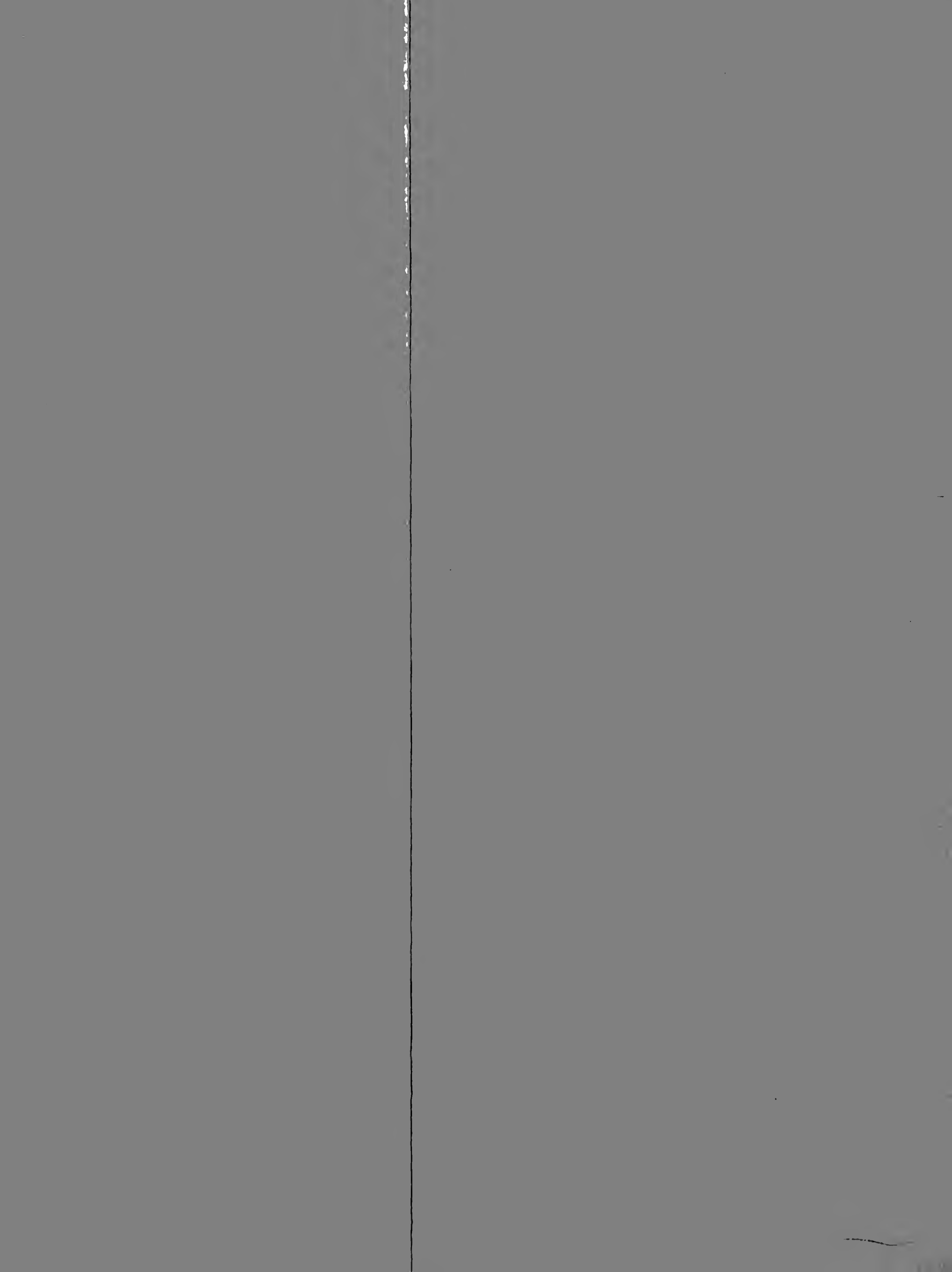
FILED



No.

United States Court of Appeals

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ANTHONY FRISONE,

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-vs-

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Appellee.

APPELLANT'S CLOSING BRIEF

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No. 16238

United States
Court of Appeals
for the Ninth Circuit.

ANTHONY FRISONE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

I

PREDJUDICIAL ERROR DID OCCUR BY JUDGE REFUSING OFFER OF PROOF

ARGUMENT

Under that portion of appellees argument as designed at "A". (See Appelee's Brief, page 8). The appellee there contends the appellant was not predjudiced by the court's refusal to allow an offer of proof. This occurred after the question as to whether or not appellant had in the past suffered from a mental illness had been objected or on general grounds. The Court had in ruling declared:

"I cannot see any bearing upon the issue here".

(See Transcript of Record, page 168)

Under this state of the record it is clear that a full offer of proof was imperative. The facts sought to be proved were imperfectly developed because of the refusal of the trial court to allow a proper offer of proof. Although the Rule of Criminal Procedure contains no provision comparable to the Rules of Civil Procedure. (See Federal Rule of Criminal Procedure 43C) under which a party may make an offer of proof where objection has been sustained to a question, an offer of proof is nevertheless appropriate and proper in order to make a record of what examining counsel expects to elicit from a witness if witness were permitted to answer.

(See McDonald vs. United States 246 - Federal (2) 727)

It is quite apparent from the trial courts ruling that the court misapprehended the purpose of the testimony and erroneously ascribed it as an attempt to prove a defense of insanity. (See Transcript of Record, page 168 and 169. See also Appellee's Brief Appendix "A" Motion for New Trial).

An offer of proof was certainly in order to fully protect the appellant's rights. If counsel had been permitted to make such an offer the error here complained of could well have been avoided. It is the rule in

connection with offers of proof that such offer embody the specific facts or facts in such connection and in such terms as to be apprehended and ruled upon in the intended sense by the trial judge and in order that the fact or facts may be applied in the appellate court in the proper light to test the ruling if adverse. (See Reynolds vs. Continental Insurance Co. #36 Mich. 131)

Under the proceeding in the lower court your appellant was arbitrarily denied the right he contended for to make such a proper offer of proof. The necessity for such an offer in the case at bar and the predjudice of the ruling are too apparent from mere observation of the record in the case to require further comment. (See Transcript of Record pages 168 and 169) Where the questions do not clearly show the nature of the testimony an offer of proof ought to be received.

State vs. Barker - 43 Kan 262 -- 24 Pac 575

Eagon vs Eagon - 68 Kan 697 -- 57 Pac .942

II

APPELLEE WAIVED ITS INCOMPENTENCY OBJECTION AT TIME OF TRIAL; EVEN SO, THE ELICITED TESTIMONY WAS COMPETENT

The proferred testimony is attacked on the ground that the desired testimony was incompetent. Inasmuch as counsel for appellee did not object at time of trial on

this ground, the objection is waived, including its presentation on appeal. An appellee, it seems, should not be permitted to devise new theories of affirmance, which were not presented to the trial court, any more than an appellant is permitted to urge new theories of reversal. The analogy is so apt and the propositions so recognized that appellant need not refer This Court to appropriate authorities, of which there are many.

At time of trial, no incompetency objection was interposed. The appellee's attorney contended that the propounded question was "improper and immaterial and irrelevant". In other words, it was generally objected to. Transcript of Record, p. 169.

There are certain grounds on which one can object to a propounded question: incompetent, irrelevant, immaterial, hearsay, etc. The law of evidence has limited the grounds in this respect, and "impropriety" is not one of them.

<u>Withers vs. Sandlin,</u> 36 Fla. 610, 18 So. 856.

However, "immaterial and irrelevant" do state, through general terms, a distinct and substantial grounds for exclusion. <u>McCormick on Evidence</u>, 1954 edition, P. 119. This objection the trial judge impliedly sustained, in saying "I cannot see any bearing upon the issue here". Transcript of Record, page 169.

In light of the foregoing, it is obvious that the only question before This Court, as was the case in the court below, is the *materiality* and *relevancy* of the proffered testimony; no incomptency ground was raised at that time, and accordingly none should be considered here.

However, if This Court determines that the compentency question is properly before it, appellant submits the remainder of this portion in support of the propriety of the question asked.

It will be recalled that the specific interrogatory propounded was: "Mr. Frisone, I'm going to ask you if you have ever suffered from any mental illness in the past". Transcript of Record, page 168. The appellant was not asked if he was insane or for what he was treated. He was simply asked if he was mentally ill at any time in the past. The question was obviously preliminary, but inasmuch as the trial judge wished no further evidence on the subject, did not allow counsel to complete his avowal, and ruled out the relevancy of such testimony, as a defense to a perjury charge, This Court cannot speculate as to the development of this defense, had it been allowed. Op. Br., p. 8.

"A person can testify to whether or not he has had a particular disease or injury if the facts are within his knowledge". *Witkin's California Evidence*, 1958 edition, p. 198, in which Frederick vs. Federal Life Insur-

ance Co., 13 Cal. App. 2nd 585, 57 Pac. 2nd 235, is cited. In the Frederick case, the plaintiff-witness was asked: "Have you at any time in your life had a disease commonly known as gonorrhea?" The reviewing court held it was prejudicial error to sustain an objection to this question, citing, among other cases, North Elk Oil Co. vs. Industrial Acc. Comm., 81 Cal. App. 582, 254 P. 582.

The 7th Circuit has held that the giving of testimony by a lay defendant-witness, as to his mental and physical condition, is within the sound discretion of the trial court. Piquett vs. United States, 81 Fed. 2nd 75. Hence, such testimony is not incomptent (in the case at bar, neither counsel asked the trial judge to invoke his discretion in this regard, since the proffered evidence was ruled out strictly on a relevancy point).

Accord 3, Nichols' Applied Evidence (pub. 1928), p. 3031, section 27, and cases citing in supporting footnote; Kinner vs. Boyd, 139 Iowa 14, 116 N.W. 1044 and Ferguson vs. Davis County, 57 Iowa 601, 10 N.W. 906.

The Pennsylvania, Alabama and Wyoming cases cited by appellee on pages 10 and 11 of its brief are unavailing, because those were concerned with insanity trials. Appellant and the trial court both recognized that there was no insanity issue in the case at bar (Transcript of

Record, page 169)

The New York decision ruled out a lay witness-plaintiff's testimony in a damage suit, which sought to establish a defective mind by reason of the complained of accident. There is a difference between a demented condition and a presently poor or forgetful memory following a mental illness. The courts have expressly noted the dissimilarity in criminal, perjury trials. McCurd vs. State, 83 Ga. 521, 10 S.E. 437, Leoptrot vs. State, 51 Fla. 57, 40 So. 616. In the latter case, the Florida supreme court observed that a lay person could not testify on the subject of insanity vel non, but that in the area of mental condition could be elecited from a defendant-witness as well, as the Florida opinion implies.

State vs. Coyne and People vs. Doody (pgs. 11,12 Appellee's Brief) have been heretofore discussed at sufficient length, and hence appellant will not restate the law of those cases as it applies to the appeal within (Op. Br., pgs. 11-13, 15 respectively). Suffice it to say that who gives the testimony is unimportant, so long as the witness is competent. Criminal defendants are qualified to testify on their own behalf, in the federal courts, and have been so since the Act of March 16, 1878. It follows, therefore, that appellee's distinction between non-defendant and defendant-witnesses

is without merit.

Appellee further attacks the question with the charge that the contemplated answer would have been conclusory in that a statement of casual connection between the mental illness and the witness' subsequent failure of memory was called for. While this was not the precise case, the question calling for a simple yes-or-no answer, appellant is willing to admit that as an aspect of all of the defense evidence the showing of this cause-and-effect would have been corroborative and hence desirable. But, as appears from the record, the trial judge desired no further testimony of the witness or other evidence in general on the point, because he considered it irrelevant. (Transcript of Record, page 169)

Nothwithstanding this attack, the cases are legion which permit a party-witness to testify as to ill effects following an accident or injury. So, in Whidden vs. Malone, Ala. supreme ct., 124 So. 516, it was held that a plaintiff in a negligence suit could testify that his memory had become impaired after the accident. Moreover, in State vs. Lindsay, 85 Kan. 192, 116 Pac. 209, a party-witness was allowed to testify that he was confined to bed after the accident and because of the confinement excessively worried over the forthcoming harvest. And in Freiberg vs. Israel, 45 C.A. 138, 187

Pac. 130, testimony of a party-witness that she was extremely nervous after the accident, that street noises affected her, particularly the noise of a bell or an automobile or police ambulance, and that she was not so affected before the accident, was held to be admissible. The connection between the undesirable consequences and the immediate injury is usually left to inference or expert testimony which establishes a casual relationship, or both.

<u>United States vs. Rose</u>, Third circuit, 215 Fed. 2nd 617, went further, and is additionally valuable in that the criminal charge was perjury and the defense lapses of memory. In an affidavit in support of a pre-trial motion to inspect and copy his prior testimony before a grand jury, defendant Rose <u>averred</u> that it was necessary for his defense in that, as a result of suffering from diabetes and a heart ailment, he experienced lapses of memory. The Third Circuit recognized this as a valid defense, and reversed his conviction, declaring that defendant Rose should have been given a transcript of his challenged former testimony. <u>U.S. vs Remington</u>, Second Circuit, 191 Fed. 2nd 246, was cited by the Third Circuit in support of his disposition, and This Court's attention is called to both decisions in appellant's opening brief (pp. 9-11); yet, appellee's brief is silent as to this <u>state</u> <u>decisis</u>.

Appellee relies on the doctrine of Spivey vs. Atteberry, Okla. supreme court, 230 Pac. 2nd 814, somewhat markedly. In that case, the plaintiff appellee was bitten by a dog, and in the course of the treatment of the wound, received an hyperdermic injection of anti-tetanus serum. He testified that as a consequence of the shot, he became ill, suffered a breaking out on and an itching of his body, and that his flesh swelled and his joints ached. These symptoms required hospitalization and, as a result, absenteeism from the plaintiff's job. The supreme court held that without more positive proof between the bite and these consequential injuries the judgment fro the plaintiff below was based on insufficient, conjectural evidence. It is to be observed that the plaintiff therein while only a lay witness, was nevertheless allowed to testify to how he felt after the dog bit him. No objection was entered as to his competency, nor was any competency question decided by the Oklahoma supreme court. In effect, the upper court ruled that the plaintiff had not carried the burden of proof, because the evidence was speculative. But no burden of proof ever rested upon the instant appellant at the trial level, and appellant need not point out the different scales used in weighing evidence in criminal and civil cases. Like Wigmore, appellants counsel naturally recognizes the rule in civil cases requiring the moving

party to establish by a preponderance of evidence the casual connection between the immediate injury and consequential symptoms (Wigmore, 3rd ed., secs. 568, 1957).

Appellee closes the sub-topic with two citations of federal authority: U.S. vs. McCreary, 9th cir.,105 Fed. 2nd 297, and McConnell vs. U.S., 3rd cir., 81 Fed.2nd 629. In the first of these, the objectionable testimony was appellee's treatment for amebiasis in a veteran's hospital. The question under review does not seek an answer as to the witness' treatment; the appellant was simply asked if he ever suffered from a mental illness. True, counsel, in commencing his offer of proof (which he was not allowed to complete), did mention the subject of treatment, but defense counsel did not represent to the trial court that he was going to prove the treatment with the defendant-witness.

In the Third-Circuit decision, a lay witness, not a party to the action, was called to establish that because of the complained-of injury, the plaintiff-appellant should have stayed in bed, instead of working. This testimony was obviously objectionable.

After conceding that poor memory and failure of recollection are defenses to a perjury charge (appellee's brief, p.13), appellee's counsel declares that when admissible and inadmissible evidence are offered together the trial court is justified in rejecting the whole, citing the Leoptrot case, McDuffie vs. U.S., 5th cir.,

227 Fed. 961, and Huntington vs. U.S., 8th cir., 175 Fed. 950. In the Leoptrot case, the trial court properly ruled out the defendant's minister's testimony on the subject of insanity, but in reviewing the point the Florida supreme court noted that this lay witness could have competently testified. Appellant and the trial judge agreed that there was no such issue in the case at bar.

In McDuffie vs. United States, defense counsel offered such a wealth of material that the upper court characterized it as a mass. The bulk consisted of all the books, checks, letters, and papers of a business. The trial judge was correct in rejecting the evidence, since the defendant did not attempt to specify what part or parts thereof was relevant. In the Eighth Circuit opinion, an original letter and press-copy of the reply were offered together. There was an objection made as to the press-copy, in that it was not properly authenticated. The court sustained the objection to the consolidated exhibit.

Both of these federal cases were concerned with documentary evidence, and in each case more than one piece of evidence was offered at a single time. No such offering of evidence was made in the case at bar; the appellant was asked one, simple question on a limited topic, which anticipated a yes-or-no answer.

Appellee's final position is two-fold: if the con-

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that [illegible]

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the [illegible]

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since the [illegible] attempt

or [illegible]

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lant was asked one [illegible] question

which anticipated [illegible] answe

Appellee's final position is t

templated testimony was erroneously excluded, the error was either cured at the trial level or non-prejudicial to the defendant (Appellee's Brief, p. 14).

As to the first reply, it is sufficiently answered by saying that the record is devoid of evidence of the defendant's mental illness, or defective memory with the exception of the question reviewed and its anticipated answer. Such excluded evidence would have corroborated and supported the defendant's testimony of facts from which poorness of memory would have been deduced. That being the case, the evidence was material to the defense, and its exclusive prejudiced the appellant.

It has been held in several jurisdictions that it is improper to exclude cummulative testimony offered by an accused on a material fact within reasonable limits.

State vs. Trueman, 85 Cap. 1024, 34 Mont. 249

Newsome vs. State, 249, S.W. 477, 93 Tex. Cr. Rep.622

Waller vs. State, 4 So.2nd 917, 242 Ala. 90

Jackson vs. State, 71 So. 2nd 825, 260 Ala. 641

Commonwealth vs. Locke, 138 N.E. 2nd 359, 335 Mass.106

State vs. Billington, 63 N.W. 2nd 387, 241 Minn. 418

Klinedinst vs. State, 266 S.W. 2nd 593, 159 Tex.Cr.Rep

State vs. Tompkins, 277 S.W. 2nd 587 (Mo.)

Further, evidence is not cummulative if no other evidence of the same kind has been offered. State vs. Harris,

desired to show that he not only had poor retentative powers generally, but that he also had an impaired, defective memory because of a mental illness. In light of the rule of the Harris case, such testimony was not wholly cummulative, but independent as well, admittedly material to the issue at hand, and accordingly should have been allowed. At any rate, clearly the excluded testimony was not ruled as being cummulative.

In support of his curred-error contention, appellee's counsel cites two cases from the Ninth Circuit, cases from District of Columbia, Fifth, and Eighth Circuits, and rule 52 (a) Federal Rules of Criminal Procedure. A review of these authorities shows that no prejudicial error occured (or was cured) because the "other testimony" covered the identical subjects which the excluded evidence sought to establish. And in no case was the tendered evidence rejected just before the defense rested, as in this case.

In Strada vs. U.S., 9th Cir., 281 Fed. 143, the defendant was charged with maintaining a common nuisance contrary to the Volstead Act. He sought to show that he only bought grape juice, but the testimony was excluded, the court saying that he had been permitted to testify that he kept and sold only grape juice. Finn vs. United States, 9th Cir., 219 Fed. 2nd 894, is an appeal from the convictions of the Finn twins for "arresting" U.S.

attorney Laughlin Waters. The appellants assigned as error the exclusion of a recital of certain civil and contempt litigation. The reviewing court said that too much testimony had already been allowed them in this respect.

In <u>Furlong vs. United States</u>, 8th Cir., 10 Fed. 2nd 492, the defendant attempted to bring out, while cross-examining a government witness, the interest, bias, and hatred of two government witnesses. Inasmuch as the defendant and a defense witness had directly testified to this interest, bias, and ill will, the upper court found no prejudice in halting the cross-examination of the government witness.

The defendant in <u>DeCamp vs. United States</u>, Dist. of Col. cir., 10 Fed. 2nd 984, was charged with conspiracy to use the mails to defraud, by selling stock in an alleged worthless corporation (supposedly a manufactory of glass caskets). The government chiefly contended that a glass casket could not be made, and introduced testimony to this end. The defense countered and offered to show by the use of a projected motion-picture film, that a casket could be made from this material. The offer was rejected, the court holding that if the film were not properly authenticated it was incompetent; that if the film were so authenticated, then there was other evidence (expert witnesses) of the same type theretofore admitted,

and henceforth the judge at his discretion could keep the film out.

The trial judge in <u>Barshop vs. United States</u>, 5th cir., 192 Fed. 2nd 699, ruled out a coverning letter and a check for about a quarter of a million dollars, which had been mailed eleven days after an income-tax-evasion indictment had been filed against the defendant. It was held that the exclusion was not error, or, if error, cured, because the defendant, after taking the stand in his own defense, repeatedly spoke of the transmittal letter and check, on direct examination.

The rule cited by appellee reads: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." <u>4 Barron & Holzoff's Fed. Prac. & Proc.</u> (rules edition) p. 437. In other words, if the exclusion of the south-for testimony did not substantially prejudice the appellant, the conviction should be affirmed. But if prejudice followed a new trial must be ordered. In this regard, This Court is asked to bear in mind that the question of the defendant's guilt or innocence was a close one, as evidenced by the jury's inability to agree when first returned to court, the length of time the jury deliberated, its absolute deadlock on counts one, three, four, and six, and its acquittal of appellant's co-defendant on count two and failure to convict her on count one. As

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count two and [illegible]

will appear below, error in a close trial may be prejudicial where the same error would be harmless had the government's case been overwhelming, and, as also will appear below, in such a trial reversible error is committed when any testimony appreciably capable of generating a reasonable doubt in the triers' minds is improperly excluded. Appellant submits that the contemplated testimony in the case at bar belonged to this class of evidence.

Appellant anticipates that at time or oral argument, counsel for the government will claim, as he claims in it brief (page 6), that the challenged testimony, given at the Mann Act trial, was positive and unqualified, whereas appellant only attempted to qualify it and render it uncertain when confronted with adverse documentary evidence during the perjury trial, and that, hence, the case was not a close one. In anticipation of any such contention, This Court is respectfully directed to Count V of the perjury indictment (Transcript of Record, page 16, 17; Appellee's brief, second appendix), which recites the allegedly false testimony, and therefrom it will appear that the questioned testimony was most assuredly unpositive and qualified.

III

APPELLEE'S SIX SEPARATE CONTENTIONS MADE UNDER DIVISION C OF HIS ARGUMENT ARE NOT TENABLE.

ARGUMENT

Appellee in his brief (see Appellee's Brief pages 14 to 23 inclusive), under division "C" of his argument makes six contentions which appellant will here attempt to refute.

First: Appellant declares that there is no logic in appellees stated proposition:

"The Courts Remarks Relative to Failure of Recollection as a Defense to Perjury were Not Misunderstood and Were Harmless."

(See C of Appellee's Brief - page 14).

Reference to the record will disclose these remarks plainly constituted a ruling on the pertinancy of evidence sought by the appellant to be adduced during the course of the trial. (See Transcript of Record pages 168 and 169)

This ruling terminated the effort of counsel for appellant to introduce evidence. (See Scupps vs. Reilly 38 Mich 10). This evidence would have been cogent at that particular stage of trial, after the factor of appellants poor recollection had been exhaustedly and let us say cleverly exploited by counsel for the government to the embarrassment of appellants defense. (See appellee's Brief pages 17 to 19)

In the case of Leaptrot vs. State 40 So. Rep. 616 cited and quoted on pages 13 and 14 of Appellants Opening Brief there is a statement from Bishop's Criminal

Law to the effect that one should not be found guilty of perjury if it is shown the false oath was "owing rather to weakness than perverseness of the party." It was on this issue the evidence was offered and the statement of the trial court consituting the ruling complained of cannot in justice be characterized as harmless. The Court eliminated from the issue of willfulness the consideration of offered evidence based upon failure of recollection which well might have generated a reasonable doubt.

<u>Second</u>: The second portion of appellees argument to the effect the court was justified in stopping counsel out of hand where an offer of proof is being attempted in the presence of the jury is not tenable. (See Appellees Brief page 9)

We point to the record itself:

> "Question (by Mr. Cantillon): Mr. Frisone, I'm going to ask you if you ever suffered from any mental illness in the past.
>
> "Mr. Jensen: I'll object to that as being improper and immaterial and irrelevant.
>
> "The Court: I cannot see any bearing upon the issue here."

(See Transcript of Record, pages 168 and 169).

Counsel for appellant motivated by the statement of the trial judge that the court was unable to see

any bearing of such evidence upon the issue attempted to point out to the court the bearing such evidence would have. It is apparent the court did not appreciate the true purpose of the proof when the court declared it did not want an offer of proof and because there was no plea of insanity in the case. The court did not take exception to the manner in which counsel was proceeding. There was no objection made to conduct of counsel. (See Transcript of Record - page 169). Appellee's contention is not reasonable and not supported in any manner by the record. The method to be followed in the making of an offer of proof is, of course, discretionary with the trial judge, and is not to be determined by counsel.

(See Sievers vs. Peters Box and Lumber Co.)

151 - Ind. 642

50 N. E. 877

52 N. E. 399

Birmingham National Bank vs. Bradley

108 Ala 205

19 So. 791

Third: Nor is it plausible that instructions however correct to the jury on the subject of failure of recollection cured the error of refusing to allow the admission during the trial of pertinent evidence upon that very subject. (See Appellee's Brief, pages 19, 20

and 21) The court very properly declared to the jury in its instructions: "You must not consider, for any purpose any evidence offered and rejected" (See Reporters Transcript of Proceedings page 459). This to appellant would appear the only instruction applicable to the subject matter of this appeal.

Fourth: Appellee relies somewhat heavily upon the colloquy between the trial court and counsel for appellant at the Hearing on Motion for New Trial. (See Appendix "A" Appellee's Opening Brief referring to Reporters Transcript Pages 513-515). The proper conclusion from a reading of the Appendix "A" would be that the trial court was confused as to the purpose and nature of the evidence which appellant had sought to produce at the trial. It strongly supports appellant's contention that a full and proper avowal should have been permitted at the trial when the matter came up.

Fifth: The argument of appellee to the effect that counsel for appellant should have been more persistent and should have asked the witness further questions on the subject is not convincing. (See Appellee's Brief page 22). This argument is not supported by a citation of any authorities. On the contrary there is a myriad of authority to the effect, once the court has announced evidence is not pertinent there is no duty of counsel for the party offended by such a ruling to pursue

it further.

<u>Caminetti vs. Pacific Mutual Insurance Co</u>.,

23 C 2nd 94 - 142 Pac 2 741

<u>Ponce vs Marr</u>

47 Cal (2) 159 -- 301 Pac (2) 837

<u>People vs. Duane</u>

21 C (2) 123 -- 130 Pac (2) 123

<u>Heimann vs. Los Angeles</u>

30 C (e) 746 -- 185 Pac (2) 597

<u>Sixth</u>: Nor is there merit in the position appellee takes that because counsel once successfully imposed upon the court counsel's view on the admissibility of certain evidence counsel should have here argued further with the court on the instant ruling (See Appellee's Brief, page 22). On at least one prior occasion the court flatly refused a request by counsel for appellant to make an offer of proof (See Transcript of Record, page 105). On another occasion the court declared to counsel in the presence of the jury that it was the courts policy to discourage offers of proof. (See Transcript of Record, page 107)

Certainly in the instant matter the court had declared its attitude toward the line of evidence sought to be elicited. (See Transcript of Record, page 168-169). With propriety no further offer of proof was in order. (See <u>Scripps vs. Reilly</u> 38 Mich 10) Continuing

to examine a witness contrary to the rulings of the trial court is treading in dangerous territory. It has been held to be contemptuous and the subject of punishment.

Halliman vs. N.S., 182 Fed. (2) 880

Halliman vs. Sup. Ct., 240 Pacific Reporter 788 (Cal).

CONCLUSION

The honest belief of the defendant at the time he gave the prior testimony was the sole issue. The evidence on the charge in question was evenly balanced. The closeness of the case is further evidenced by the statement of the jury itself when it returned to the court room after several hours deliberation announcing it was unable to agree as to the guilt or innocence of either of the defendants on any of the five counts upon which it was deliberating (See Reporters Transcript of Proceedings, pages 485 to 488).

Error which may be harmless is a one-sided case may be prejudicial in a close one. Koteakos vs. U.S., 328 U.S. 750, 90 L.Ed. 1557.

It is not unfair to here assert that any quantum of evidence could have tipped the scale in the instant case. The erroneous exclusion of evidence which might have generated a reasonable doubt of guilt if predjucial error.

Estep vs. U.S., 327 U.S. 114

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Certainly evidence rejected in a perjury case which tended to establish a lack of the element of wilfulness on the part of the person testifying could have been persuasive and well might have created a reasonable doubt. Keeping here in mind that wilfulness was the sole issue to be determined.

Dearing vs. U.S., 167 Fed (2) 310

Koteakos vs. U.S., 328 U.S. 750 - 90 L.Ed. 1557.

Dated at Beverly Hills, California.

June 5, 1959.

Respectfully submitted,

CANTILLON & CANTILLON
and R. MICHAEL CANTILLON

By____________________
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No. 16242

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY HUGHES,

Appellant,

v.

ROBERT A. HEINZE, Warden,
Folsom State Prison,

Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the Northern District of California, Northern Division

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printed in CALIFORNIA STATE PRINTING OFFICE

FILED

MAR 18 1959

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No. 16242

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

HENRY HUGHES,

Appellant,

v.

ROBERT A. HEINZE, Warden,
Folsom State Prison,

Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the Northern District of California, Northern Division

STATEMENT OF THE CASE

The appellant, Henry Hughes, filed in the United States District Court for the Northern District of California, Northern Division, on June 9, 1958, a petition for a writ of habeas corpus (TR * 1-30). The court on July 12, 1958, issued an order to show cause directed to Robert A. Heinze, Warden of the California State Prison at Folsom, returnable on June 23, 1958 (TR 31). On June 20, 1958, the Warden filed a

* TR refers to Clerk's Transcript of Record on Appeal.

"return to order to show cause and motion to dismiss" together with points and authorities in support of the return and motion (TR 31-37, 37-45). A copy of the judgment pursuant to which the petitioner was then confined in the State Prison was attached to the return as Exhibit A (TR 34-36). The petitioner on July 8, 1958, filed a motion for permission to proceed in forma pauperis and a traverse to the respondent's return (TR 45-51).

After a hearing on July 21, 1958, to which date the matter had been continued on July 7th, to permit the filing of a traverse, the District Court took the matter under submission, and on July 24, 1958, a memorandum and order was made and entered by the court denying petitioner's request for appointment of counsel and granting the warden's motion to dismiss (TR 52-55). On August 13, 1958, the District Court denied an application for a certificate of probable cause for an appeal (TR 70-71). The District Court on August 15, 1958, denied a petition which it treated as a motion for a rehearing on or reconsideration of petitioner's application for a certificate of probable cause (TR 71-72).

A petition for a certificate of probable cause was filed in this court and on October 7, 1958, the court in a *per curiam* opinion granted the certificate of probable cause and set aside the certificate of the District Court that the appeal is not taken in good faith.

Based upon the record before this court it appears that the appellant was convicted of the crime of burglary in the County of Orange, State of California, on June 20, 1952, after trial before the court without a jury upon an information filed by the district attorney. A copy of the judgment was attached to the return filed by the respondent in the District Court. No appeal was taken from the judgment.

A pleading in the nature of a petition for a writ of coram nobis was filed by the appellant in the State Superior Court in March, 1953. That petition, which was denied, did not raise the points now urged by appellant and no appeal was taken from the Superior Court's denial of the petition.

On July 23, 1953, the appellant filed a petition for writ of habeas corpus in the Supreme Court of the State of California (*In re Hughes,* Cal. Sup. Ct. No. Crim. 5509). This petition did not present any of the grounds now urged by appellant. Certiorari was not sought in the United States Supreme Court after the denial of this petition by the California Supreme Court.

On May 17, 1957, the appellant filed another petition for writ of habeas corpus in the California Supreme Court (*In re Hughes,* Cal. Sup. Ct. No. Crim. 6090). The grounds urged in that proceeding and which are also presented in the matter before this court were: (1) that the petitioner was denied a speedy trial; (2) that the trial court erred in ruling on the admissibility of evidence relating to

other crimes; and (3) that petitioner was denied his right to a jury trial which he did not effectively waive. Other points therein raised are not involved here. In opposition to the petition the Attorney General filed in the California Supreme Court certified copies of the clerk's and reporter's transcripts of the proceedings in the trial court and the State Supreme Court on September 18, 1957, denied the petition. Thereafter a petition for writ of certiorari was presented to the United States Supreme Court, which petition was denied (*Hughes* v. *California*, Misc. No. 370, 355 U. S. 964, 78 S. Ct. 554, 2 L. Ed. 2d 539). The record of the California Supreme Court proceeding was made available to the District Court and is before this court.

ARGUMENT

I. The Appellant Failed to Exhaust His State Remedies With Respect to All But Three of the Grounds Raised in the Petition

In his petition filed in the District Court the appellant presented seven grounds upon which he urged that the court should issue the writ. The appellant in his opening brief mentions an eighth point which is asserted to have been inferentially raised—the knowing use by the prosecution of perjured testimony (App. Brief, p. 20, ll. 4-19). We must confess to being unable by reading between the lines of the petition to find any such allegation. In any event this and the following four points set forth in the petition have never been raised in any

state court proceeding and particularly were not raised in the habeas corpus proceeding in the California Supreme Court (No. Crim. 6090) from which the appellant sought certiorari in the United States Supreme Court: That appellant was arrested without reasonable or probable cause and without a warrant, that the information upon which appellant was tried was filed without a required preliminary examination and after the charge had been dismissed upon a preliminary examination, that the appellant was not confronted with the prosecuting witness, and that the appellant was denied effective aid of counsel.

The appellant has not alleged any circumstance which would bring him within any exception to the requirement of exhausting state remedies. (28 U. S. C., sec. 2254.) The District Court was therefore required to dismiss the petition as to these points. (*Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; *Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; *Vanderwyde* v. *Denno,* 113 F. Supp. 915, aff'd. and opinion adopted 210 F. 2d 105, cert. den. 347 U. S. 949; *U. S. ex rel. Langer* v. *Ragen,* 237 F. 2d 827.) The requirement of exhaustion of state remedies must be met "except when there is an absence of an available state corrective process, or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" (*Darr* v. *Burford,* above cited, 339 U. S. at page 218). The Supreme Court

further stated in *Darr* v. *Burford,* 339 U. S. at page 218:

> "Flexibility is left to take care of the extraordinary situations that demand prompt action."

No such exceptional circumstances or need for prompt action is shown to exist here, and the District Court properly dismissed the petition as to these grounds.

II. The Allegations of the Appellant's Petition Do Not State a Justiciable Federal Question

The District Court had before it the appellant's petition, respondent's return, the traverse and the record of the California Supreme Court in the case of *In re Hughes* (Crim. No. 6090). The three allegations of the petition which had been previously presented to the state court were: (1) that petitioner had not effectively waived the right to trial by jury accorded him under state procedure; (2) that he was denied a speedy trial; and (3) that evidence of other crimes was erroneously received by the trial court.

A. THE PETITION FAILED TO SHOW THE DENIAL OF DUE PROCESS WITH RESPECT TO THE QUESTION OF WAIVER OF A JURY TRIAL

The appellant alleged in his petition for writ of habeas corpus that he was denied due process of law by reason of the fact that he had not effectively waived his right to trial by jury which was guaranteed to him under California law. He had previously raised this question in the state court in the case of *In re Hughes,*

Cal. Sup. Ct. No. Crim. 6090. The record of the Supreme Court in that case was made available to the District Court and is before this court. That record shows that at the time the appellant was brought to trial his counsel stated in open court that a jury trial had previously been waived in the department of the presiding judge. There was no objection on the part of the appellant to this procedure and he proceeded to trial before the court, sitting without a jury. There is nothing which positively shows that the appellant personally waived his right to a jury trial, although the statement of the counsel to the court implies that there had been a waiver of the right to a jury trial by counsel and by the appellant. The clerk's transcript, page 8, thereof, shows: "The defendant waived trial by jury." The State Supreme Court, in passing upon the petition for a writ of habeas corpus, impliedly found that the appellant had effectively waived his right to a jury trial guaranteed him under the State Constitution.

In any event, the appellee respectfully submits that the contentions of the appellant on this point do not raise a federal constitutional question. It has been held that the United States Constitution does not guarantee to defendants the right to a jury trial in criminal prosecutions in state courts.

In *Farrell* v. *Lanagan,* 166 F. 2d 845 (cert. den. 334 U. S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775) it was held that proof of the fact that petitioner did not realize what he had signed when he waived a jury trial in a

criminal prosecution in a state court did not show a denial of due process since the Federal Constitution does not prevent a state from completely abolishing trial by jury in criminal cases (citing: *Brown* v. *Mississippi,* 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; *Snyder* v. *Massachusetts,* 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674).

A similar case is *Tompsett* v. *State of Ohio,* 146 F. 2d 95 (cert. den. 324 U. S. 869, 65 S. Ct. 916, 89 L. Ed. 1424). In the *Tompsett* case a jury trial was waived by counsel in the presence of the defendant. The petitioner contended that he was denied due process of law. The Circuit Court of Appeals, in affirming the judgment of the District Court denying the writ of habeas corpus, stated as follows:

> "Generally, the Fourteenth Amendment to the Federal Constitution and the Constitution of the State of Ohio, art. 1, sec. 10, guarantee a person accused of crime certain rights of which he may not be deprived without his consent. Among these is the right to trial by jury, the right to appear in person or by an attorney, to have compulsory process to secure the attendance of witnesses in his behalf and to have a fair and impartial trial according to the method of procedure generally followed in courts in the trial of criminal cases. All of these enumerated rights are for the benefit of the accused. He alone is interested in them and under well-settled legal principles, the accused may waive those growing out of the Constitution, as well as irregularities occurring in the trial of the cause and such a

waiver may be shown by acts and conduct and also by non-action. Patton v. United States, 281 U. S. 276, 309, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 146; Adams v. United States ex rel. McCann, 317 U. S. 269, 281, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435; Diaz v. United States, 223 U. S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

*   *   *   *   *

"* * * All of the misconduct of his attorney of which he complains occurred in open court and in the presence of the presiding judge, yet at no stage of the proceedings did appellant repudiate his counsel or manifest to the court his objection to or lack of concurrence in the procedure counsel was following. Under such circumstances it must be concluded that appellant intelligently waived trial by jury and consented to or ratified all other acts of his attorney of which he complains."

In *Ex parte Whistler,* 65 F. Supp. 40 (appeal dismissed 154 F. 2d 500; cert. den. 327 U. S. 797, 66 S. Ct. 822, 90 L. Ed. 1023), the court held that where an accused waives a jury trial in a state court he has been accorded due process (citing *Hallinger* v. *Davis,* 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986). In the case of *Sims* v. *Alves,* 253 F. 2d 114, the court held that the failure of a defendant to waive his right to a jury trial in writing as required by an Ohio statute did not establish grounds for his release upon habeas corpus in a federal court

on the ground that he had been denied due process of law.

It is respectfully submitted that the question of whether petitioner adequately waived his right to a jury trial is solely a matter of state procedure and presents no federal question (*Farrell* v. *Lanagan,* 166 F. 2d 845, above cited).

Since the question of effective waiver of a defendant's right to a jury trial presents a matter of state procedure, the decision of the California Supreme Court on this point should be held to be binding upon this court. The California Supreme Court did not, as contended by the appellant, summarily deny his petition. On the contrary, there was presented to the Supreme Court certified copies of the transcript of proceedings in the trial court and the Supreme Court after taking judicial notice of these records necessarily decided the issue of fact of whether or not the appellant had effectively waived his right to trial by jury guaranteed to him by state law. If this court or the Federal District Court were to decide this issue contrary to the holding of the State Supreme Court it would be deciding a question of state law contrary to a specific finding on this point by the state court. It is respectfully submitted that the appellant's contention concerning the waiver of his right to trial by jury presents a state question only. No federal question relating to denial of due process of law was presented to the District Court, and no issue of fact was raised.

Therefore that court was justified in dismissing the petition for writ of habeas corpus and the Warden was not required by the provisions of 28 U. S. C. Sec. 2243 to produce the appellant at the hearing when the petition and return presented only issues of law.

B. THE PETITIONER WAS NOT DENIED THE RIGHT TO A SPEEDY TRIAL

The reporter's and clerk's transcripts in this matter (see *In re Hughes,* Calif. Sup. Ct. No. Crim. 6090), as well as the allegations of the appellant herein, show that the appellant was brought to trial within 60 days after the filing of the information. He was therefore brought to trial within the time provided by statute (California Penal Code Sec. 1382 provides in effect that a defendant must be brought to trial within 60 days after the finding of the indictment or filing of the information). The fact that the appellant was brought to trial within 60 days, pursuant to the provisions of this statute, affirmatively shows that he was accorded due process of law, that the trial of this matter was not unduly delayed, and that he was not denied the right to a speedy trial.

In the case of *In re Sawyer's Petition,* 229 F. 2d 805 (cert. den. 351 U. S. 966, 76 S. Ct. 1025, 100 L. Ed. 1486) the petitioner was not brought to trial for more than a year after he was indicted and arrested. In holding the petitioner had not been deprived of any "right to a speedy trial" under the

Federal Constitution the court stated at pages 811-812 of 229 F. 2d:

> "The trial court was correct in holding that Sawyer was not denied rights given him by the Constitution because of any delay in bringing him to trial. It is clear that the Federal Constitution does not give an absolute right to a 'speedy trial' as such to persons tried in state courts. The Constitutional right to a 'speedy trial' is contained in the Sixth Amendment. It is common knowledge that the first ten amendments do not apply to state tribunals and that the Fourteenth Amendment, which does apply to the states, does not necessarily include all of the first ten. Wolf v. People of State of Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782; Adamson v. People of State of California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903. Before we can order the release of a state prisoner for failure to obtain a 'speedy trial,' we must be convinced that the failure resulted in the taking of the prisoner's liberty or property without due process of law.
>
> "The right to a speedy trial is relative and must always be judged by the surrounding circumstances. Beavers v. Haubert, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950; United States ex rel. Hanson v. Ragen, 7 Cir., 166 F. 2d 608. Under the circumstances shown by the record in this case the delay in bringing Sawyer to trial was not so unreasonable as to contravene his Constitutional rights."

The appellant in the present case has failed to show that he was in any way handicapped or deprived of due process of law by reason of the fact that two months elapsed between the filing of the information and his trial.

C. THE ALLEGATIONS OF THE PETITION WITH RESPECT TO ERROR IN THE ADMISSION OF EVIDENCE DO NOT PRESENT A FEDERAL QUESTION

The appellant herein contends that he was denied due process of law for the reason that the trial court permitted the prosecution to introduce evidence of the commission of similar offenses, which offenses were not charged in the information. It is unnecessary to extend this brief by extensive argument to support the proposition that proof of similar offenses is relevant and admissible in a criminal prosecution where such similar offenses establish a common plan or scheme, or tend to show the intent with which an act was done (see 18 Cal. Jur. 2d 585-590 and cases there cited).

It is well established that the application of rules of evidence in state courts does not present a question of due process under the Fourteenth Amendment of the United States Constitution. That constitutional provision does not impose rules of evidence on state courts.

In *Lisenba* v. *People of the State of California,* 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166, the court held that the question of whether the trial court properly admitted evidence of other crimes to show intent or a common plan or scheme did not present a question of

due process under the Federal Constitution. (See also: *Hoag* v. *State of New Jersey,* 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913; and *Ciucci* v. *State of Illinois,* 356 U. S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983.)

It is respectfully submitted that there is no merit whatever in appellant's contentions that he was denied due process by reason of the fact that the trial court erred in its ruling on the admissibility of evidence. This is purely a matter for determination by state courts. The appellant was represented at the trial by counsel of his own choosing and there is no showing that counsel was incompetent or failed to adequately represent appellant with respect to matters relating to the conduct of the trial and the admissibility of evidence.

The allegations of the appellant in his petition filed in the District Court did not, therefore, present any federal question relating to the admissibility of evidence upon which the District Court had jurisdiction to act in a habeas corpus proceeding.

III. The Appellant Was Not Denied Due Process of Law by the Action of the California Supreme Court in Denying Appellant's Petition for a Writ of Habeas Corpus Without Granting Appellant a Hearing

In his traverse the appellant advanced an additional reason why the writ of habeas corpus should issue, to wit, that the California Supreme Court in denying his petition for writ of habeas corpus without granting him a hearing thereby denied him due process of law.

This court, in its *per curiam* opinion filed on October 7, 1958, granting the certificate of probable cause states that this point may possibly present a federal question and might involve an issue of fact (citing *Thomas* v. *Teets,* 205 F. 2d 236).

It is the appellee's contention that the California Supreme Court was not required to grant a hearing to the appellant in connection with the petition for writ of habeas corpus which was filed in that court. The contentions raised in the state court proceeding and which are again raised here relate to the question of whether the appellant effectively waived his right to trial by jury, whether he was denied a speedy trial as required by California statutes, and whether evidence was erroneously received by the trial court. All of these questions could have been raised by the appellant on an appeal from the judgment since all of them relate to matters which were of record before the trial court. By failing to appeal from the judgment the appellant waived any right to assert such contentions in the state courts and the California Supreme Court was justified in denying the petition for writ of habeas corpus on the ground that these contentions had been waived (*In re Seeley,* 29 Cal. 2d 294, 176 P. 2d 24; *In re Lindley,* 29 Cal. 2d 709, 177 P. 2d 918; *In re Manchester,* 33 Cal. 2d 740, 204 P. 2d 881; and see *Brown* v. *Allen,* 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469). In particular the California Supreme Court has held that the writ of habeas corpus is not available to

secure the discharge of a petitioner for failure to accord him a speedy trial where the petitioner is entitled to obtain his discharge under the provisions of California Penal Code, section 1382, for failure to bring him to trial within the required statutory period of 60 days (*In re Alpine,* 203 Cal. 731, 265 Pac. 947), or to review questions relating to the admissibility of evidence (*In re Lindley,* 29 Cal. 2d 709).

With respect to these last two points this court has already stated in its opinion of Oct. 7, 1958, that such points involve no question of due process under the Federal Constitution and hence no federal question of which the District Court could take cognizance. With respect to the contention concerning the effective waiver of the appellant's right to a trial by jury guaranteed by him by California law, the appellee has already set forth above its arguments in support of the contention that this point does not present a federal question.

The case of *Thomas* v. *Teets,* 205 F. 2d 236, cited by this court is not in point and is dissimilar upon its facts from the situation presented here. In *Thomas* v. *Teets* the petitioner had alleged in his petition filed in the State Supreme Court that he had been coerced into pleading guilty to the crime of murder by threats and inducements of the sheriff. This question involved an issue of fact which was entirely dehors the record. In order for the State Supreme Court to resolve this issue and accord the

petitioner due process of law it was necessary for that court to conduct a hearing. The reasoning of this court in *Thomas* v. *Teets* is exemplified by the following quotation at page 240:

> "Since the application alleged a violation of due process which was dehors the record of the state criminal proceeding, the supreme court was required to issue the writ."

It has been pointed out above that in the habeas corpus proceeding in the California Supreme Court that court had before it a transcript of the record in the trial court and took judicial notice of the contents of that record. Upon doing so, the court resolved the issue and held that under California law the petitioner had effectively waived his right to a trial by jury. This was purely a question of state law and was decided by the state court adversely to the appellant on adequate evidence and on state grounds. No federal question and no issue of fact was raised in this proceeding upon which the District Court was required to conduct a hearing.

CONCLUSION

It is respectfully submitted that the petition and other matters presented to the District Court in this case fail to raise any issue relating to denial of due process of law or any other ground on which that court was authorized to issue a writ of habeas corpus. The appellant had not exhausted his state remedies with respect to all but three of the contentions therein

raised and with respect to these latter points the record before the District Court conclusively showed that no federal question was presented and no issue of fact was raised. The question of waiver of a jury trial related solely to a matter of state procedure on which the State Supreme Court had already passed, and the arguments relating to denial of a speedy trial and erroneous introduction of evidence clearly presented no federal question. The District Court properly dismissed the petition and its order should be affirmed.

Respectfully submitted,

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No. 16244

IN THE

Jnited States Court of Appeals

FOR THE NINTH CIRCUIT

RIC O. SONNTAG,

Appellant,

vs.

NITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED
JAN 14 1959
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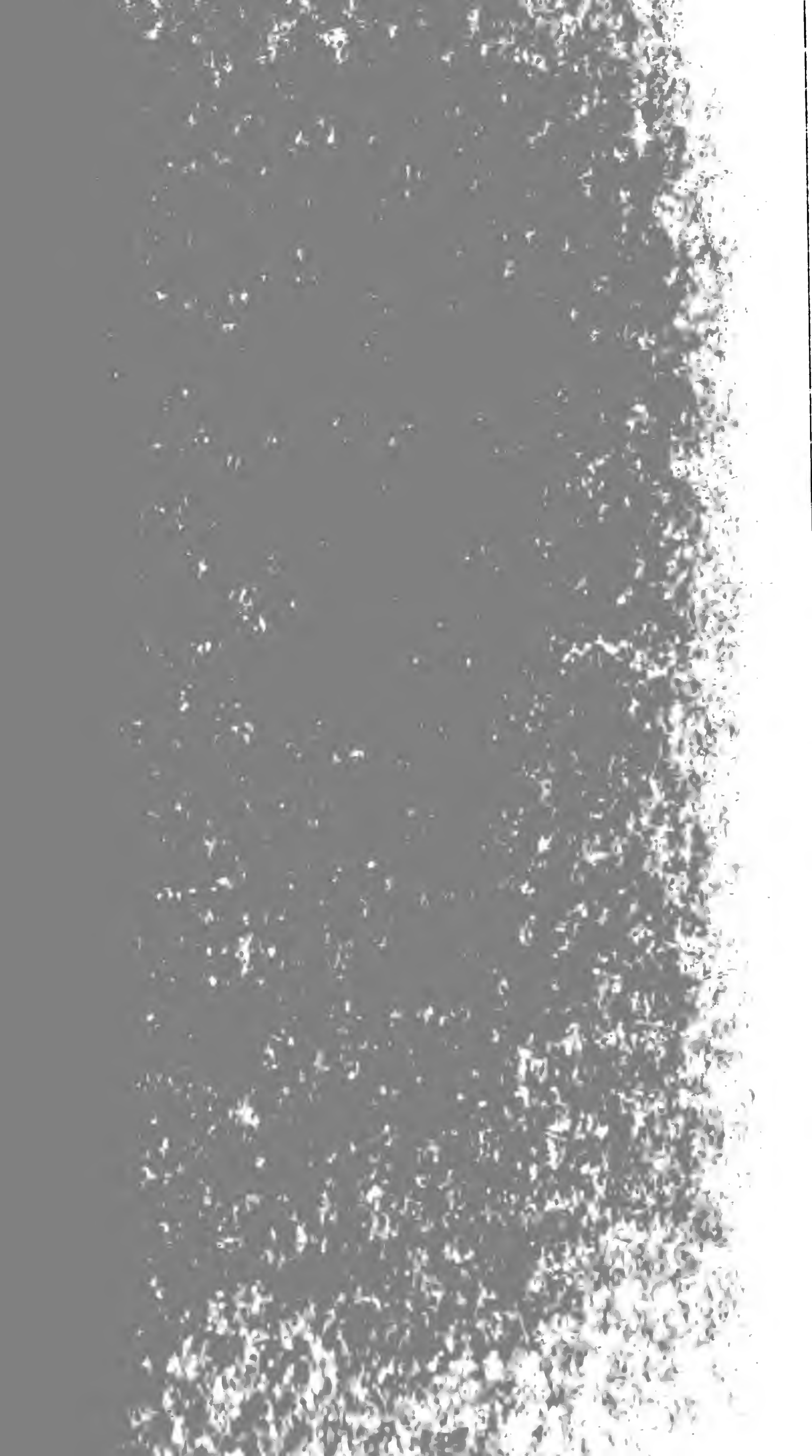

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No. 16244

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERIC O. SONNTAG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

The jurisdiction of the District Court is founded upon Title 18, U. S. C. A., Section 3231 (June 25, 1948), and initially arose in this case by reason of an indictment [Clk. Tr. 2], returned by the Grand Jury in the Southern District of California, Central Division, in which appellant was charged in eleven counts with devising and intending to devise a scheme and artifice to defraud, by use of the United States mails, divers persons who desired to purchase pets and other animals from him, all in violation of Title 18, U. S. C. A., Section 1341 (as amended May 24, 1949).

Hearing was had on a motion [Clk. Tr. 18, *et seq.*] by appellant under Rule 17(b) of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., to have subpoenaed at the government's expense certain named wit-

nesses. Upon denial of said motion, appellant was tried in a bench trial which resulted in a judgment of conviction [Clk. Tr. 102] for which appellant was sentenced to the custody of the Attorney General for a period of 14 months.

The jurisdiction of this court was invoked by a notice of appeal [Clk. Tr. 113] under the provisions of Title 28, U. S. C. A., Section 1291 (October 31, 1951), and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended April 12, 1954, effective July 1, 1954).

Throughout this brief, all references to pages in the Clerk's Transcript will be preceded by the abbreviation "Clk. Tr.," while all references to the pages in the Reporter's Transcript will be preceded by the abbreviation "Tr."

Statement of the Case.

This is an appeal from a judgment of conviction by which appellant was sentenced to a 14-month term of imprisonment for devising and intending to devise, over a 37-month period ranging from January, 1955, to February, 1958, a scheme and artifice to defraud divers persons by the operation of a mail order pet and rare animal business. Appellant seeks reversal of this judgment on the twofold ground that certain of the findings of fact of the Honorable Ernest A. Tolin, United States District Judge, while finding some support in the record, are clearly erroneous and that the Honorable Jacob Weinberger, United States District Judge, erred in denying appellant's motion to have witnesses produced at the government's expense under Rule 17(b), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., on the ground that appellant's affidavit in support of said motion was insufficient.

The pertinent facts are as follows: Appellant is fifty-three years old, married, and the father of two daughters [Tr. 419]. In 1947, he came to this country from Germany via England, where he had lived for some years, and settled in Los Angeles [Tr. 419]. Soon after his arrival he borrowed $500.00 from his mother for initial working capital and opened a pet store [Tr. 419]. For about three years appellant operated a conventional retail pet shop [Tr. 364, 419, 420]. Then, in an attempt to enlarge the volume of his business, he began to advertise his animals for sale in various publications of nationwide circulation [Tr. 364]. In addition to magazine advertising, appellant also employed direct mail advertising whereby he would send directly to prospective customers cards or price lists which would list the animals he had available for sale at the time [Tr. 364]. Some of these cards of which Government's Exhibit 11 is an example contain wording to the effect that the listed animals were " 'IN STOCK FOR IMMEDIATE SHIPMENT' " [Tr. 17]. Also contained in many of appellant's mailings was a statement to the effect that " 'Deposits may be refunded on orders which cannot be filled within 45 days' " [Government's Ex. 2, Tr. 11]. At about the same time the tenor of appellant's business commenced to change from that of a small local retail pet shop to include worldwide importation and exportation of rare birds and animals on a wholesale basis [Tr. 420].

As a result of these activities, the volume of appellant's business increased; but the overhead increased apace and the business did not prosper [Tr. 420]. The business, hampered by lack of operating capital and by various interruptions in source of supply was continuously in a precarious financial condition [Tr. 420-421]. In an effort to keep down the overhead of the business, appellant

undertook to perform himself most of the work in the conduct of the business. In this he was assisted from time to time by some part-time girls and his wife [Tr. 423]. However, generally speaking, appellant not only bought and cared for the animals but kept the books and records, crated animals for shipment, arranged for advertising and mailing, answered correspondence, and generally performed the myriad jobs necessary to the conduct of a rather extensive import-export mail order business [Tr. 251, 434, 435]. Although he worked 7 days a week, 52 weeks a year, from the time he started the business [Tr. 423], appellant was still too overburdened to give that attention to detail which is requisite to good business practice [Tr. 433-434]. As a result, during the year 1955, and subsequent thereto appellant failed to fill certain mail orders received by him; nor did he in some cases refund the moneys which accompanied said orders although his advertising stated "deposits may be refunded on orders which cannot be filled within 45 days" [Government's Ex. 2, Tr. 11, 245].

Complaints about appellant's defalcations were made to the postal authorities during 1955 [Tr. 245-250]. Upon receiving these complaints, Postal Inspector Claude P. Donovan undertook an investigation of appellant and his business practices [Tr. 244-246]. In the course of his investigation, Inspector Donovan had conferences with appellant in August [Tr. 245, 253] and November [Tr. 255] of 1955 and February of 1956 [Tr. 261]. Additionally, the inspector talked with appellant over the telephone on several occasions [Tr. 257-258]. In these conversations Inspector Donovan informed appellant that the Post Office Department had received complaints against him for failure to fill orders or return money sent with the orders [Tr. 245-247]. Appellant admitted the truth of

the complaints [Tr. 248, 277] and explained to the inspector the problems inherent in the operation of his business [Tr. 250-252]. Appellant acknowledged his indebtedness to the complainants [Tr. 252] and told the inspector that he would do his best to refund the misappropriated funds. He expressed the view that business would improve so as to permit him to make full restitution to all parties whose orders had not been filled [Tr. 253, 256, 257, 259, 263, 264, 265, 266, 267].

In the course of his investigation, Inspector Donovan told appellant that in view of his (appellant's) promise to adjust the complaints the Post Office Department was "not in a position to do anything about it" (the complaints) [Tr. 260]. Appellant, in fact, on November 4, 1955, furnished the inspector with evidence of the adjustment of several of these complaints [Tr. 257]. Throughout his contacts with Inspector Donovan, appellant repeatedly explained that his failure to properly service his customers was the result of failure of his source of supply [Tr. 259] coupled with the financial inability to make all refunds [Tr. 256]. He at all times made clear that his intent was to repay his creditors as soon as he could [Tr. 253, 256, 257, 259, 263]. Following his last conversation with Inspector Donovan in February, 1956, appellant did, in fact, repay over a dozen of his mail order creditors [Tr. 73, 369, 370, 376, 377, 379]. All told, appellant has during the period covered by the indictment made refunds to more than twenty people in a total sum of over $1,000.00 [Tr. 73, 366, 367, 369, 370, 371, 375, 376, 377, 379].

On February 19, 1958, the Grand Jury for the Southern District of California, Central Division, returned a true bill indicting appellant on eleven counts for devising

and intending to devise a scheme and artifice to defraud by use of the mails divers persons, nine of whom were named in the indictment [Clk. Tr. 2-9]. Appellant made a motion under Rule 17(b), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., to subpoena, at the government's expense, witnesses from various parts of the country [Clk. Tr. 18 *et seq.*].

Hearing on the motion was had at San Diego, California, before the Honorable Jacob Weinberger [Tr. A-1 to A-36]. After hearing argument, the Honorable District Judge denied appellant's motion on the ground that appellant's affidavit in support thereof was insufficient to meet the requirements of Rule 17(b), Title 18, U. S. C. A. [Clk. Tr. 43; Tr. A-32].

On June 17, 1958, the cause came on for trial before the Honorable Ernest A. Tolin, sitting without a jury, in Los Angeles, California. Since appellant's motion under Rule 17(b), Title 18, U. S. C. A., *supra,* had been denied, appellant was compelled to enter into a stipulation of testimony and facts [Clk. Tr. 55-85] to secure the testimony of the majority of his witnesses. At the trial, stipulations covering the testimony of 20 government witnesses was read into the record [Tr. 8-82], and at the conclusion of said reading the written stipulations on file were stricken and replaced by the stipulated testimony in the record [Tr. 82-83]. In addition to the aforesaid 20 stipulation witnesses, the government produced 9 witnesses in court and rested its case in chief. The defense introduced the stipulated testimony of 10 witnesses [Tr. 312-321] and produced 3 witnesses, including appellant, in court.

Following argument, the court found the appellant guilty. Special findings of fact were submitted by the

government. Objections to said special findings were entered by the appellant [Clk. Tr. 94], who also submitted proposed special findings [Clk. Tr. 96]. Objections were filed by the government to appellant's proposed findings [Clk. Tr. 100]. On July 11, 1958, the court overruled appellant's proposed findings and, despite appellant's objections, the following findings were finally adopted pursuant to Rule 23(c), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., which findings, it is submitted by the appellant, are, in the light of the evidence, "clearly erroneous" in that the evidence upon which they are based is as consistent with the theory of innocence as it is with the adopted theory of guilt:

(a) Finding of fact II [Clk. Tr. 104-105] that prior to on or about January 26, 1955, and continuing to on or about February 19, 1958, appellant wilfully devised and executed a scheme and artifice, as charged in count one of the indictment [Clk. Tr. 2] and as reincorporated by reference in each of the subsequent counts of the indictment [Clk. Tr. 3-9];

(b) Finding of fact III [Clk. Tr. 105] that said scheme and artifice (the existence of which is denied by appellant based upon the evidence) was wilfully devised and executed by appellant to defraud divers classes of persons named in said finding and said indictment and to obtain money and property from said persons by means of false pretenses, representations, and promises which appellant knew at the time would be false when made;

(c) Paragraph 3 of finding of fact IV [Clk. Tr. 106] that at the time appellant caused various advertisements to be placed in certain magazines named in paragraph 1 of said finding of fact he (appellant)

did not intend to ship to the persons who ordered the same the pets, animals, birds, and reptiles which he so advertised and did not intend to refund deposits made on ordered pets, animals, birds, and reptiles not shipped within 45 days of appellant's receiving of said orders;

(d) Finding of fact V [Clk. Tr. 106] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count one of the indicement [Clk. Tr. 2-3] or anyone;

(e) Finding of fact VI [Clk. Tr. 106-107] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count two of the indictment [Clk. Tr. 3-4] or anyone;

(f) Finding of fact VII [Clk. Tr. 107] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count three of the indictment [Clk. Tr. 4] or anyone;

(g) Finding of fact VIII [Clk. Tr. 107] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count four of the indictment [Clk. Tr. 5] or anyone;

(h) Finding of fact IX [Clk. Tr. 108] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count five of the indictment [Clk. Tr. 5-6] or anyone;

(i) Finding of fact X [Clk. Tr. 108-109] in so far as it purports to find the existence of any scheme

or artifice on the part of appellant to defraud the persons named in count six of the indictment [Clk. Tr. 6] or anyone;

(j) Finding of fact XI [Clk. Tr. 109] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count seven of the indictment [Clk. Tr. 6-7] or anyone;

(k) Finding of fact XII [Clk. Tr. 109] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count eight of the indictment [Clk. Tr. 7] or anyone;

(l) Finding of fact XIII [Clk. Tr. 109-110] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count nine of the indictment [Clk. Tr. 8] or anyone;

(m) Finding of fact XIV [Clk. Tr. 110] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count ten of the indictment [Clk. Tr. 8-9] or anyone;

(n) Finding of fact XV [Clk. Tr. 110-111] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count eleven of the indictment [Clk. Tr. 9] or anyone;

(o) Finding of fact XVI [Clk. Tr. 111] in so far as it purports to find that the government established findings of fact II, III, IV (par. 3), V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV and

each count charged in the indictment beyond a reasonable doubt or in any way whatsoever;

(p) Finding of fact XVII, finding the appellant guilty as to counts one, two, three, four, five, six, seven, eight, nine, ten, and eleven of the indictment as charged therein.

Appellant's objection to the aforesaid findings is preserved for appeal by reason of Rule 52 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A. Rule 52(a) provides in pertinent part: "Requests for findings are not necessary for purposes of review." Under said rule, all objections to findings of fact are deemed reserved and are, accordingly, presented by the general appeal.

Judgment was entered in this case under which appellant was sentenced to a fourteen-month term of imprisonment [Clk. Tr. 102]. This appeal followed [Clk. Tr. 113].

Summary of Argument.

I.

INTRODUCTION.

II.

THE COURT ERRED IN DENYING ON THE GROUND OF INSUFFICIENCY OF THE SUPPORTING AFFIDAVIT APPELLANT'S MOTION UNDER RULE 17(b), TITLE 18, U. S. C. A., TO SUBPOENA WITNESSES AT GOVERNMENT EXPENSE.

III.

CERTAIN OF THE FINDINGS OF FACT ARE, IN LIGHT OF THE EVIDENCE, CLEARLY ERRONEOUS AND MUST BE REVERSED IN THAT THE EVIDENCE, CONSIDERED AS A WHOLE, IS AS CONSISTENT WITH INNOCENCE AS WITH GUILT.

ARGUMENT.

I.

Introduction.

This is an appeal by Eric O. Sonntag, appellant herein, from a conviction of violations of the mail fraud statutes, Title 18, U. S. C. A., Sections 1341 *et seq.* Appellant, in the operation of a mail order pet and rare animal business, placed advertisements in national magazines and mailed advertisements to divers persons in which he advertised various birds, animals, and reptiles to be "in stock for immediate shipment" and in which he further represented that deposits received by him might be refunded if he did not make shipment within 45 days.

While appellant has been engaged in the aforesaid business for over ten years, during the 37-month period from January, 1955, to February, 1958, in a small number of cases he received orders and money in response to his advertisements and did not either fill the orders or refund the money so received. Admitting that his business practices left much to be desired, appellant contends that, while civil liability may be established by his acts and omissions, it was not proved that said acts and omissions were the result of a scheme or artifice to defraud inasmuch as he lacked the intent necessary to justify a conviction under the statutes he was charged with violating. Appellant further contends that the Honorable Jacob Weinberger erred when he rejected, on the ground of an insufficient supporting affidavit, appellant's motion under Rule 17(b), Title 18, U. S. C. A., to subpoena witnesses at the government's expense.

II.

The Court Erred in Denying on the Ground of Insufficiency of the Supporting Affidavit Appellant's Motion Under Rule 17(b), Title 18, U. S. C. A., to Subpoena Witnesses at Government Expense.

Appellant first assigns as error the action of the Honorable Jacob Weinberger, United States District Judge, in denying appellant's motion made under Rule 17(b), Title 18, U. S. C. A., to subpoena certain witnesses at the government's expense [Clk. Tr. 43]. Generally speaking, the granting of a motion under Rule 17(b), *supra,* is a matter left to the discretion of the trial court and in the absence of an abuse of that discretion the appellate court will not disturb the discretion of the trial judge. This Honorable Court recognized this rule in

> *Dupuis v. United States* (C. C. A. 9th, 1925), 5 F. 2d 231,

in which it was stated:

> "That the matter of such procurement was within the discretion of the court is both statutory and settled by the courts. Rev. Stat. §878 (Comp. St. §1489); *Goldsby v. U. S.,* 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343; *O'Hara v. U. S.,* 129 F. 551, 64 C. C. A. 81."

See also:

> *Meeks v. United States* (9th Cir., 1950), 179 F. 2d 319, 322;
>
> *Austin v. United States* (C. C. A. 9th, 1927), 19 F. 2d 127, 129, *cert. den.,* 175 U. S. 523, 48 S. Ct. 22, 92 L. Ed. 405;
>
> *Gibson v. United States* (C. C. A. 8th, 1931), 53 F. 2d 721, 722.

The above-stated rule is too firmly seated to admit argument. Appellant does not claim here that the court below abused its discretion in making a factual determination of appellant's motion. Appellant does claim, however, that the Honorable District Judge erred, as a matter of law, when he held that appellant's affidavit in support of said motion was insufficient to establish appellant as one of the class of persons contemplated by Rule 17(b), Title 18, U. S. C. A., *supra*, and upon the alleged insufficiency of said affidavit denied the motion. Thus this assignment of error concerns itself, not with whether the court abused its discretion in weighing evidence presented to it relative to the materiality of, or the necessity for, the testimony of the proposed witnesses or the extent of appellant's assets, but rather it concerns iself, as a matter of law, with the basic legal sufficiency of appellant's affidavit in support of his motion.

In a phrase, appellant maintains that, while the District Court may have discretion in determining the facts, it has no unfettered discretion in the interpretation of a purely legal question.

Turning to the wording of Rule 17(b), Title 18 U. S. C. A., it is therein provided in pertinent part:

> "(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness."

The hearing on the motion in question was had before the Honorable Jacob Weinberger, who was incidentally not the trial judge, on June 5, 1958, in San Diego. Appellant, in accord with the provisions of Rule 17(b), *supra,* supported his motion with an affidavit [Clk. Tr. 19-23] which provided in material portion:

> "Eric O. Sonntag, being first duly sworn, deposes and says:
>
> "1. That he is the defendant in this case and makes this affidavit in his behalf pursuant to Rule 17(b) of the Federal Rules of Criminal Procedure.
>
> "2. That he believes that he does not have sufficient means and is actually unable to pay the costs of process and the fees for attendance of the following named witnesses at the forthcoming trial of this action. His reasons for said belief shall hereinafter be made to appear.
>
> "3. That he has heretofore incurred expenses in his defense herein which have seriously affected his financial position; said expenses have included a bail bond and attorney's fees.
>
> "4. That while he is engaged in the wholesale and retail pet shop business in the city of Los Angeles, he has experienced financial difficulties in the operation of said business and he does have a number of creditors in said business.
>
> "5. That the cash at his disposal is approximately $300.00; to use this cash would jeopardize seriously the *the* operation of said business and his personal living; that he does not own or have an interest in any real property; that he did recently receive a sum of money from the sale of real property in Germany, but that the proceeds of said sale so received by him had been disbursed before the need for said witnesses was made known to him.

"6. That he has discussed the meaning of the phrases 'does not have sufficient means' and 'is actually unable to pay,' as used *insaid* Rule, with his attorney and that his attorney has advised him that in his opinion said phrases do not require that a defendant be an actual indigent in order to obtain the beneficence of said Rule; that affiant does not believe that he is an actual indigent nor a pauper, but he does believe that he has not the means and that he is not actually able to pay for said mileage and fees within the meaning of said Rule as so explained to him by his attorney."

The affidavit then sets out the names and addresses of 10 proposed witnesses and the testimony which each was expected to give if called and concludes [Clk. Tr. 22]:

"8. That he will have witnesses at said trial who reside in the Los Angeles area; that he will provide the costs for the attendance of said witnesses at his own expense; but that he cannot afford to provide for the attendance of witnesses from other areas of the United States.

"9. That the testimony of each of the aforesaid witnesses is material to defendant's defense in that this is a prosecution for using the mails to defraud the theory of the pr*osectuion's* case is that defendant took orders for pets through the mails and intentionally failed to fulfill said orders, keeping the money given upon said orders for himself; the aforesaid testimony will tend to rebut said theory in that it will show that he had no such intent and that he had no scheme or device to defraud by use of the mails.

"10. Defendant states that he cannot safely go to trial without the testimony of each of the aforesaid witnesses at his said trial."

After preliminary discussion regarding the theory of the case the court read Rule 17(b), *supra* [Tr. A-9], and questioned whether appellant's affidavit *prima facie* brought him within the class of persons (indigent defendants) mentioned therein [Tr. A-10]. After the affidavit was read in part into the record [Tr. A-10 to A-12], the court remarked [Tr. A-14]:

> "* * * I think we ought to know more about the condition. I will say this: *It appears to me that just on the face of the situation now that your affidavit is not sufficient to give the Court the information that he is an indigent and that he comes within this rule.*" (Emphasis added.)

Subsequently the following colloquy occurred between defense counsel and the court [Tr. A-17]:

> "The Court: I don't know whether the defendant in this case is a millionaire or whether he is a pauper. In fact, as you stated in the affidavit—
>
> Mr. Zinman: But I have answered—
>
> The Court: —he was able to—and all that. Those are all conclusions.
>
> Mr. Zinman: I have also alleged *he doesn't have more than $300 at his disposal.*
>
> The Court: That doesn't mean anything, 'at his disposal.' He may have means. He may have a business that is of considerable value * * *" (Emphasis added.)

and again at page A-27 of the transcript:

> "The Court: I am not satisfied that you have complied with the rule.
>
> * * * * * * * *
>
> The Court: You do as you want to do. But when you state that you will rest upon your affidavit,

that is up to you. I will determine the matter whichever way you decide to proceed. But I don't think that the present situation, as you have stated in your affidavit, that it is sufficient and complies with the rule."

In denying appellant's motion, the court stated [Tr. A-32]:

"The Court: The defense counsel has appeared in court with his client, the defendant, but has declined to have his client take the stand and give testimony as to his financial condition. The Court is of the opinion that the defendant's affidavits have failed to establish that he is an indigent; that he does not have sufficient means; and that he is actually unable to pay the fees of the witnesses mentioned in his motion and affidavit. He has failed by either affidavit or by oral testimony, which he has been given the opportunity to adduce, to bring himself within the provisions of Rule 17 or within the provisions of the opinions cited by his counsel: Adkins versus DuPont Company, 335 U. S. 331-339.

The defendant's motion is denied."

In passing it may be noted that the Honorable Jacob Weinberger was in error in his statement that appellant's counsel had declined to allow his client to take the stand for examination on his financial situation [Tr. A-32 to A-33]. At page A-17 of the transcript appellant's counsel offered to allow appellant to take the stand for questioning by the court, the sole restriction being that the court and not the prosecutor should conduct the questioning.

From the foregoing it is clear that appellant's motion was denied because the court felt that the supporting affidavit was, as a matter of law, insufficient to establish

appellant as an "indigent defendant" entitled to the benefits of Rule 17(b), Title 18, U. S. C. A., *supra*. The questions of the materiality and the necessity of the testimony of the proposed witnesses set forth in the affidavit were never reached. Appellant contends that the affidavit was sufficient in that it did establish him as an indigent within the meaning of Rule 17(b) and that, accordingly, the court erred in denying the motion on the ground that indigency was not shown.

An examination of the affidavit in question clearly shows compliance with all the requisites of Rule 17(b), *supra:*

The rule requires that the name and address of each witness be stated. The affidavit conforms to this requirement, naming 10 witnesses and stating their addresses [Clk. Tr. 20-22]. The rule requires that the affidavit set forth the testimony each witness will give if subpoenaed. Again the affidavit complies with this requirement, setting out the expected testimony with particularity [Clk. Tr. 20-22]. The rule further requires that the affidavit show the expected testimony to be material to the defendant's defense. This requirement is met in paragraph 9 of the affidavit [Clk. Tr. 22] wherein it is explained in detail how the expected testimony will serve to establish defendant's lack of intent to defraud by use of the mails. The rule next requires that the affidavit contain a statement that the defendant cannot safely go to trial without said witnesses. Paragraph 10 of the affidavit [Clk. Tr. 23] states in this regard:

> "* * * Defendant states that he cannot safely go to trial without the testimony of each of the aforesaid witnesses at his said trial."

The final and, for the purposes of this brief, most important requirement of the rule is that—

> "The motion * * * shall be supported by affidavit in which the defendant shall state * * * that the defendant does not have sufficient means and is actually unable to pay the fees of the witness."

Paragraph 2 of the affidavit [Tr. A-19] states in the statutory language defendant's inability to secure the attendance of the witnesses. Additionally, paragraphs 3, 4, 5, and 6 [Clk. Tr. 19-20] set out specific reasons relating to his financial condition which show further why he is unable to pay for the travel of the witnesses. Clearly all of the requirements set out in Rule 17(b) were met by appellant's affidavit in support of his motion.

It is submitted that the Honorable District Judge labored under a misapprehension as to the degree of financial inability which must be shown to classify a person as an indigent defendant within the meaning of Rule 17(b), *supra.* A person need not be a pauper to be indigent. Comparatively speaking, a pauper is without funds or assets of any kind and is normally dependent upon charity for the provision of the bare necessities of life; while an indigent, as the term is used in the statutes relating to indigents, is one who is without sufficient means to make the payment he seeks by his petition to avoid and still provide for those who can legally claim his support. "Indigence" is compared to "poverty" in Webster's Dictionary of Synonyms, First Edition, 1951, page 636, as follows:

> "Poverty, the most comprehensive of these terms, may imply either the lack of all personal property or possessions * * * or it may imply resources so limited that one is deprived of many of the necessities and

> all of the comports of life * * * Indigence * * * does not suggest dire or absolute poverty, but it always implies reduced or straitened circumstances and therefore usually connotes the endurance of many hardships and the lack of comforts; * * *"

In

> *Goodall v. Brite* (1936), 11 Cal. App. 2d 540, 54 P. 2d 510,

the court in defining the word "indigent" in connection with the admissions to county hospitals stated at page 515 of the Pacific Reporter:

> "Applying this definition to the instant case, we hold that the word 'indigent,' when used in connection with admissions to county hospitals, includes an inhabitant of a county who possesses the required qualifications of residence, and *who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support.*" (Emphasis added.)

Citing:

> *Dupue v. District of Columbia,* 45 App. D. C. 54, Ann. Cas. 1917E, 414;
>
> *In re Hybart,* 119 N. C. 359, 25 S. E. 963;
>
> *Massachusetts Gen. Hospital v. Inhabitants of Belmont,* 233 Mass. 190, 124 N. E. 21;
>
> *People v. Board of Supervisors,* 121 N. Y. 345, 24 N. E. 830.

See also:

> 21 Words and Phrases 152, 153;
>
> 42 C. J. S. 1363.

Thus the fact that appellant had a pet shop business and $300.00 in cash does not preclude him from the

status of an indigent if the expenditures of the funds necessary to bring the witnesses to the trial (estimated by the government to be from $3,000.00 to $4,000.00) [Tr. A-15] would disable him from "providing for those who legally claim his support." The affidavit establishes this to be the case.

The instant case is one of first impression on the requisites of an affidavit to establish indigence for a motion under Rule 17(b), *supra*. However, it is submitted that a somewhat analogous situation is presented by cases testing the sufficiency of affidavits filed in support of *forma pauperis* motions taken under Title 28, U. S. C. A. 1915, which provides in pertinent part:

> "(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress."

Even though that section by definition (use of the word "pauper") would logically raise a more stringent standard of requisite impecuiosity than would Rule 17(b), it has been conclusively established that the plaintiff's destitution is not a prerequisite for proceeding in *forma pauperis*. In

> *Adkins v. E. I. Dupont de Nemours & Co.* (1948), 335 U. S. 331, 93 L. Ed. 43,

the Supreme Court, in discussing the sufficiency of affidavits filed in support of a motion to appeal *in forma*

pauperis, stated at page 339 of the United States Report, page 49 of the Lawyer's Edition:

> "* * * We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. *We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'* To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. * * * Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution. We think a construction of the statute achieving such consequences is an inadmissible one." (Emphasis added.)

The court also held in the same case that pauper's affidavits drawn in statutory language were ordinarily acceptable, stating at page 339 of the United States Report, page 48 of the Lawyer's Edition:

> "Consequently, where the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation." (Emphasis added.)

See also cases collected in the annotation in 6 A. L. R. 1281, *et seq.*

In the light of the foregoing it is clear that "indigent defendants" within the meaning of Rule 17(b), Title 18, U. S. C. A., are, of necessity, persons who are not entirely destitute; but rather the rule includes within the term "indigent" those persons who, if not granted the relief prayed for in their motion, will be forced for practical monetary considerations either to forego the testimony of the necessary witnesses they desire or by bearing the cost of producing said witnesses deprive themselves and their dependents of support to which they are entitled. *A fortiori* appellant's supporting affidavit which was drawn largely in the language of the rule was sufficient to establish him as an indigent. He stated in paragraph 2 [Clk. Tr. 19] that he "does not have sufficient means and is actually unable to pay the costs of process and the fees for attendance of the following named witnesses at the forthcoming trial of this action." In paragraph 4 [Clk. Tr. 19] of the affidavit, he alleged that, while he was engaged in the wholesale-retail pet shop business in the City of Los Angeles, "he has experienced financial difficulties in the operation of said business and he does have a number of creditors in said business." Finally, in paragraph 5 [Clk. Tr. 19-20], he stated, "That the cash at his disposal is approximately $300.00; to use this cash would jeopardize seriously the operation of said business and his personal living; that he does not own or have an interest in any real property; * * *"

Appellant was an indigent as the term is used in Rule 17(b), and the court below erred in denying his motion when said denial was based on the supposed insufficiency of the supporting affidavit. That the dereliction of the court in denying appellant's motion affected substantial rights of the appellant within the meaning of Rule 52, Title 18, U. S. C. A., is clear from a review of the record:

As heretofore stated, appellant's aforesaid affidavit set out, in conformance with the requirements of Rule 17(b), *supra,* the names and addresses of 10 witnesses. As soon as said affidavit was served upon counsel for the government, the government availed itself of its vast investigative resources and had the proposed witnesses (who resided at various points from Michigan to California) [Clk. Tr. 20-22] interviewed by the postal inspectors [Tr. A-17, A-23, A-24]. After the court denied appellant's motion to produce said witnesses at the government's expense, appellant was unable because of financial considerations to obtain the testimony of said witnesses in any way other than by stipulation. Accordingly, appellant was forced to enter into stipulations with the government in which appellant stipulated to the testimony of 22 government witnesses, and the government stipulated to the testimony of appellant's 10 requested witnesses [Clk. Tr. 55-85]. These stipulations in greater portion were read into the record at the time of trial as previously stated at page 6 of this brief [Tr. 8-82, 312-321]. The stipulated testimony of the government's witnesses is contained in the transcript from page 8 through 82.

The stipulation, as drawn and read into the record, stipulated only that the witnesses would be deemed to have testified as therein set forth. With the exception of stipulated facts separately set out, the truth of the testimony was not stipulated, all objections other than those going to foundation of documents being reserved. At only one point in the stipulation of the testimony of the government's witnesses was there any cross-examination stipulated. The reason for this was, of course, that the appellant, lacking the resources of the government, could not afford to interview in advance of trial 22 government witnesses who lived in all parts of the country. In

addition, only nine of twenty-two government witnesses were named in the indictment; the remaining thirteen were used for the purpose of showing similar acts. Thus, up to the time of the stipulation, appellant had no knowledge of the identity of the other witnesses. The result was a classic illustration of the legal truism that, "You can't cross examine a paper record." That the government was not under the same disability is immediately apparent from a brief review of the appellant's stipulation [Tr. 312-321] where appellant stipulated to cross-examination for six of his ten witnesses.

By reason of the court's failure to grant appellant's motion under Rule 17(b), *supra,* he was put in the untenable position of stipulating on the government's terms or going to trial without the testimony of his witnesses. There could be but one answer to this choice and the stipulations were the result. The net effect of the court's denial of appellant's aforesaid motion was effectively to deprive appellant of his right to cross-examination of a majority of his accusers, all to his great prejudice.

In recapitulation of appellant's position on this point, appellant's affidavit complied with the requirements of Rule 17(b), *supra.* It set out the names and addresses of the witnesses and a résumé of the proposed testimony of each. It stated that the testimony of each of the witnesses was material to his defense and stated in what way such materiality existed. It stated that defendant could not safely go to trial without the testimony of the witnesses. Finally, it stated that appellant did not have the means to pay the costs of process and fees for attendance of the witnesses; that, while he had a business, the business was in debt; and that the cash at his disposal was approximately $300.00, the use of which

would seriously jeopardize his livelihood and that of his family. Since the affidavit was sufficient, the court erred when it denied the motion basing its denial on the insufficiency of the affidavit. The error was material and affected substantial rights of the appellant as the net result of the court's action was to force appellant into an unfavorable stipulation depriving him of the opportunity to confront and cross-examine his accusers. This was plain error and should be reversed.

III.

Certain of the Findings of Fact Are, in Light of the Evidence, Clearly Erroneous and Must Be Reversed in That the Evidence, Considered as a Whole, Is as Consistent With Innocence as With Guilt.

This section of the argument is devoted to an attack by appellant on the trial court's findings of fact. It is contended that, although certain of the findings have some support in the evidence, they are clearly erroneous in that the evidence upon which they are based is at least as consistent with the theory of innocence as it is with the theory of guilt.

Unlike the sacrosanctity accorded by appellate courts to the findings of administrative tribunals and juries, the findings of a trial court and the evidence in support thereof are, when attacked, open to review on appeal. If, upon a review of all the evidence, the reviewing court is left with a definite conviction that although there is evidence to support each of the findings a mistake has been made, the reviewing court must reverse. A trenchant exposition of this rule was made by the Supreme Court in

United States v. United States Gypsum Co. (1948), 333 U. S. 364, 92 L. Ed. 746,

wherein it was stated at page 766 of the Lawyer's Edition of the United States Report:

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

See also:

United States v. Oregon State Medical Soc. (1952), 343 U. S. 326, 96 L. Ed. 978;

Gamewell Company v. City of Phoenix (9th Cir., 1954), 216 F. 2d 928;

Alaska Freight Lines v. Harry (9th Cir., 1955), 220 F. 2d 272.

The above-stated rule has particular applicability to a case such as the instant case where the major portion of the testimony was introduced by stipulation and read into the record by counsel. In such a situation the trial court possesses no advantage over the reviewing court in that the decision at the trial level was based largely

on paper testimony and the traditional advantage of the trial judge of observing the witnesses' demeanor was not present. On the other hand, the reviewing court has certain advantages not available in such a case to the trial court. There are two additional judges to consider the testimony and, in addition, the reviewing court is not impelled to action by the necessity for quick decision but can take sufficient time to deliberate on all aspects of the problem. In the aggregate, where the testimony is introduced by stipulation at trial level, the qualifications of the reviewing court to evaluate properly the evidence are superior to those of the trial judge. As expressed in

5A C. J. S. 575, 576:

> "It is often held that the appellate court is not bound by the trial court's findings but may make an original examination of the evidence as contained in the record and make an independent decision on the factual questions where the evidence on which the findings of the trial court are based is entirely or largely documentary, or the testimony of witnesses, which instead of being given orally with the witness before the court, has been reduced to, and presented to the court in the form of, a written statement or record, such as an affidavit, deposition, or report or transcript of testimony previously given; and this is so although no declarations of law were asked and given or refused.
>
> "The reasons given for this rule are that under such circumstances the appellate court is in just as good a position as the trial court to form a just estimate of the credence to be given to an examination of the case."

See also cases collected in Note 80, page 575, of 5A Corpus Juris Secundum.

There are 17 findings of fact herein which are contained in the Clerk's Transcript at pages 104-111. Since there is no objection to Finding of Fact I, Findings II through XVII, inclusive, are hereinbelow digested *seriatim* and, in conformity with Rule 18(d) of this Honorable Court, their objectionable aspects particularized.

Finding II is an omnibus finding alleging the existence of a scheme and artifice as alleged in each of the 11 counts of the indictment. This finding provides [Clk. Tr. 104-105]:

> "Prior to on or about January 26, 1955 and continuing to on or about February 19, 1958, defendant ERIC O. SONNTAG wilfully devised and executed a scheme and artifice substantially as charged in Count One of the indictment and likewise as so re-incorporated by reference in each of the subsequent counts of the indictment."

Appellant contends said finding is clearly erroneous in so far as it finds any scheme or artifice to defraud devised or executed by him.

Finding III sets forth the intents and purposes of the alleged scheme and artifice [Clk. Tr. 105]:

> "Said scheme and artifice was wilfully devised and executed by defendant ERIC O. SONNTAG (1) to defraud persons who desired to purchase pets, animals, birds, and reptiles, and persons who owned and operated stores and shops selling pets, animals, birds, and reptiles, and those persons and shops specifically named in each count of the indictment; and (2) to obtain money and property from said persons and shops by means of false pretenses, representations, and promises which defendant ERIC O. SONNTAG, well knew at the time would be false when made."

This finding is clearly erroneous in so far as it finds the existence of any scheme or artifice by appellant to defraud or obtain money from the named persons by false representations, pretenses, and promises.

Finding IV explains the workings of the alleged scheme. It provides [Clk. Tr. 105-106]:

> "Said scheme and artifice contemplated use of the mails and consisted of the following:
>
> "(1) defendant Eric O. Sonntag, caused to be placed in nationally distributed magazines, including 'All Pets Magazine,' 'Popular Mechanics Magazine,' and 'Billboard,' advertisements which offered pets, animals, birds, and reptiles for sale to the general public at specified prices;
>
> "(2) defendant Eric O. Sonntag caused to be mailed to the general public and to owners and operators of retail pet shops, throughout the United States, including the persons and shops named in the indictment, printed price lists offering pets, animals, birds and reptiles for sale at specified prices, some of which said price lists stated that the pets, animals, birds and reptiles advertised therein were in stock for immediate shipment, and others of which promised to refund any deposit made on submitted orders which defendant Eric O. Sonntag was unable to fill within 45 days of his receipt thereof;
>
> "(3) at the time said advertisements were caused to be placed and mailed by defendant Eric O. Sonntag, as aforesaid, defendant Eric O. Sonntag as he then and there well knew, did not intend to ship to the persons who ordered same, the pets, animals, birds and reptiles which he so advertised and did not intend to refund deposits made on ordered pets, animals, birds, and reptiles not shipped within 45 days of defendant's receipt of said orders."

The advertising and mailing alleged in paragraphs (1) and (2) of Finding IV are admitted; however, appellant maintains that paragraph (3) of the finding is clearly erroneous in alleging the existence of a scheme or artifice to defraud pursuant to which alleged scheme and artifice appellant is alleged to have intended, at the time of placing said advertising alluded to in paragraphs (2) and (3), not to ship the ordered animals and not to make refunds of money received with said orders.

Finding V finds that appellant mailed a letter to Mark Champlin for the purpose of executing said alleged scheme and artifice to defraud. This finding relates to count one of the indictment [Clk. Tr. 2] and provides [Clk. Tr. 106]:

> "That, with respect to Count One of the indictment, on the 31st day of March, 1955, in Los Angeles County, California, defendant Eric O. Sonntag, for the purpose of executing the aforesaid scheme and artifice, and attempting so to do, caused to be placed in an authorized depository for mail matter a letter addressed to Mark Champlin Zoo, Indianola, Iowa, R.R. 3, to be sent or delivered by the Post Office Establishment of the United States."

Appellant admits the mailing as found but contends that in so far as the finding purports to find the existence of a scheme or artifice to defraud by appellant it is clearly erroneous.

Findings VI through XV relates respectively to counts one through eleven of the indictment [Clk. Tr. 3-9] and, with the exception of names, dates, and description of the particular use of the mails, are identical to Finding V, *supra.* In each case, appellant admits the act of using the mails but urges that each of said findings is clearly errone-

ous in so far as it purports to finding the existence of a scheme or artifice to defraud on the part of appellant.

Finding XVI provides [Clk. Tr. 111]:

> "The plaintiff, UNITED STATES OF AMERICA, has established each and all of the foregoing findings of fact, and each count charged in the indictment beyond a reasonable doubt."

This finding is "clearly erroneous" in so far as it finds that a scheme or artifice by appellant to defraud has been established in any of the preceding findings or as charged in the indictment.

Finally, Finding XVII finding appellant guilty as charged in counts one through eleven of the indictment [Clk. Tr. 2-9] is clearly erroneous inasmuch as the evidence upon review shows that there was extant no scheme or artifice to defraud on the part of appellant.

It will be noted from the foregoing that each of the above findings has as its basis the assumption that appellant's acts in advertising, mailing, etc., were motivated by some scheme or artifice to defraud. This was denied by appellant at the trial and is denied now. It is appellant's position that, while the various acts of advertising and mailing were performed by him and he did not furnish the ordered animals or rebate the money in certain of the cases, these acts and omissions, far from being the result of a plan to defraud, sprang from the inherent nature of the mail order pet business in conjunction with business reverses and lax business practices.

A review of the evidence will suffice to show the validity of appellant's position. In the interests of expedition, appellant will give a general survey of the various actions on his part which were testified to by the government's

witnesses and will state by way of footnote the places in the transcript at which such testimony may be found. Thirty-one witnesses were produced to prove the government's case. The testimony of twenty-two of these witnesses was offered by stipulation and, with the exception of the proposed testimony of proposed stipulation witnesses Elsinger and Coleman [Tr. 48-55] was so received. Nine witnesses, viz.: Youngclaus, Hockett, Pefley, Rye, Hagerman, Dooley, Morrison, Champlin, and Frankenfield, were indictment witnesses (*i.e.,* persons who had transactions with appellant as charged in counts one through eleven of the indictment). For the convenience of the court, appellant has included as Appendix A to this brief a chart listing the government's witnesses *seriatim* and designating the pages of the transcript at which various portions of their testimony is contained.

With the exception of witnesses Hunter (of "Popular Mechanics" magazine), Westenberg (of "All Pets" magazine), Chyrklund (of the Better Business Bureau), and Donovan (United States Postal Inspector, retired), all government witnesses testified substantially that they saw one of appellant's advertisements[1] advertising certain species of animals and birds "In Stock for Immediate Shipment" and that "Deposits may be refunded on orders which cannot be filled within 45 days";[2] that they sent an order accompanied by money through the mails to appellant;[3] that they received a reply from him acknowledging receipt of the order (in some cases);[4] that they did not receive the pets ordered; and that in all but three cases the money was not restituted.[5]

In addition to the foregoing witnesses, the government produced witnesses Hunter [Tr. 83-98] and Westenberg

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Footnotes 1 through 5 appear on pages 59 to 61, for convenience of Court.

[Tr. 98-104], representatives of "Popular Mechanics" and "All Pets" magazines respectively, each of whom testified that during the year, 1955, advertisements were placed with their magazines by appellant. Witness Chyrklund, a representative of the Better Business Bureau, testified on behalf of the government [Tr. 227-243] presumably for the purpose of proving that his organization had received complaints about the appellant. However, the court refused the government's offer of proof, and the testimony of this witness adds nothing. Witness Donovan, a retired postal inspector, testified on behalf of the government that he was assigned to investigate complaints made against appellant [Tr. 245-246]; that he discussed complaints with appellant on three occasions and talked to him via telephone on several others; that appellant had told him that he was in financial straits and was conducting the business largely himself and with what help he could get from his wife and part-time workers [Tr. 251]; that appellant promised to adjust the complaints [Tr. 252-253, 256, 259, 263-267]; that he verified with Pan American Airways the fact that they refused to carry further shipments of monkeys [Tr. 276]; that appellant furnished him with evidence of adjustments [Tr. 257, 268-269]; that he told appellant that in view of his promise to adjust the complaints the Post Office Department was not in a position to do anything about it [Tr. 260]. Testimony of witness Donovan concluded the government's case in chief.

The appellant introduced a stipulation as to the testimony of witnesses Hilton, Harlow, Baker, Campbell, Owens, Gilmore, Olbrich, Robison, Baird, and Utley. Each of these witnesses testified to the effect that at some time during the indictment period they had placed an order with appellant for various pets and had received

them. Stipulated cross-examination revealed that in some instances the orders had been filled only after the witnesses had made inquiry concerning same and that some witnesses were not satisfied with the pets received [Tr. 312-321].

Witness Thompson, called on behalf of appellant, testified that he had purchased pets, birds, and animals of various kinds from appellant over a five-year period; that he had made such purchases from him during the years, 1955, 1956, and the first portion of 1957 [Tr. 323]; that at no time did appellant fail to fill an order for him [Tr. 323-324]; and that appellant's prices were competitive with those of other firms [Tr. 333-334].

Witness Matute testified on behalf of appellant that he was an executive with Pan American World Airways; that in 1955, 1956, and 1957 he was in charge of inbound and outbound cargo at the Los Angeles International Airport; that the word "cargo" included livestock [Tr. 351]; that Pan American had shipped livestock at the request of appellant and had shipped livestock consigned to appellant during the years, 1955, 1956, 1957; that from October, 1955, on, Pan American put an embargo on the transportation of certain types of livestock, particularly monkeys [Tr. 352]; that the embargo did not cover cargo planes [Tr. 355] but that shipments of monkeys from South America had to be carried, if at all, by passenger plane [Tr. 357].

Appellant testified in his own behalf that he had been engaged in the livestock importation, exportation, retail, and wholesale business in Los Angeles for 10 years [Tr. 362-363]; that in the course of his business he advertised in magazines with nationwide circulation and had also used direct mail advertising [Tr. 363-364]; that during

the years, 1955, 1956, and a portion of 1957 he had occasion to refund moneys in excess of $1,000 to persons whose orders he had not been able to fill (for the convenience of the court appellant has set out in Appendix B to this brief a schedule of persons to whom he has refunded money) [Tr. 365-383]; that during the period covered by the indictment he had successfully consummated numerous business transactions for pets, a number of which he itemized [Tr. 384-397]. In this connection it should be noted that following considerable itemization of these transactions the court, taking cognizance of the fact that appellant had just begun to exhaust his file of such transactions, requested that in the interest of expedition some other arrangement be made to get the evidence of appellant's successful business dealings into the record [Tr. 397-399]. In response to the suggestion of the court, appellant's business records were offered and received in bulk [Tr. 401-402]. Appellant further testified that in the year, 1955, the gross dollar amount of his business was $39,626.87 [Tr. 402]; that in the year, 1956, the gross dollar volume of his business was $31,078.37 [Tr. 404]; that for the first two months of the year, 1957, the gross dollar volume of his business was $4,102.96 [Tr. 405]; that in each of the aforementioned periods mail orders accounted for approximately one-third of the transactions and about 50 percent of the gross dollar volume of business [Tr. 403-405].

Appellant explained his failure to fulfill orders or refund money to certain of the government's witnesses. In this connection he stated that as to government witness Champlin the order was for 8 female Rhesus monkeys; that Rhesus monkeys are difficult to obtain; that he did not have 8 females at the time he received the order; that he

made efforts to obtain them; that he offered to ship Java monkeys; that upon the receipt of Champlin's order it was his intention to fill it or return the money but that by the time he ascertained the order could not be filled he was in financial straits and did not have the money available to send back [Tr. 406-412].

As to witness Hockett, appellant stated that he had had prior successful dealings with said witness; that he received an order for 2 pairs of exotic finches from said witness; that he did not have the finches in stock at the time he received the order; that he did unsuccessfully attempt to fill the order; and that he did not refund the money because he did not have it [Tr. 412-416, 419].

As to witness Youngclaus, appellant testified that he received said witness' order for 3 monkeys; that he was unable to furnish the monkeys because of the aforesaid airline embargo; that he had in lieu of the monkeys sent him other animals; and that he, at the time of the trial, had discharged his obligation except for $2.50 [Tr. 424-426].

As to witness Dooley, appellant testified that he did not fill her order for a Mynah bird; that he intended to fill the order, but when it was received there were no Mynah birds available [Tr. 427]. As to witness Hagerman, appellant testified that he had not filled said witness' order for a monkey, no explanation being brought out for this neglect [Tr. 427-430].

As to witness Morrison, appellant testified that he had received an order from said witness for 3 monkeys; that he did not send the monkeys nor did he refund the money, that his reason for not sending the monkeys was the aforesaid airline embargo; that when he received the order he intended to fill it; that he did not refund the money be-

cause he did not have any money to refund at the time he found he could not supply the monkeys [Tr. 430-432].

As to witness Pefley, appellant testified that he received an order from said witness for guinea pigs and chipmunks which was not filled by him; that chipmunks were not available at the time the order was received because the supply is dependent upon the part-time activities of private persons and as a result is uncertain; that the chipmunks could be sent by mail but guinea pigs are not accepted by any other carrier than railway express or air express which are too expensive considering the value of the animal; that without the chipmunks to defray the cost of shipment it would be impracticable to ship them [Tr. 432-434].

As to witness Rye, appellant testified that he received an order for a 2 pairs of golden hamsters and 2 chipmunks; that he did not fill the order nor did he refund the money because of lax business practices in that the order "just got beneath the urgent orders" [Tr. 432-434].

As to witness Frankenfield, appellant testified that he received an order for 2 chipmunks which he did not fill; that he did not refund the money and that the reason for his neglect was overwork in that he forgot the order [Tr. 435-437]. As to witness Coon, appellant testified that he received an order for 4 different kinds of monkeys; that he made an attempt to fill the order; that he did not send the monkeys and did not refund the money; that he offered to fill the order about 6 months after receipt but said witness insisted on a refund at that time; that he felt that if he closed his business all of the persons he owed money to would lose their money [Tr. 438-439].

As to witness Cameron, appellant testified that he owed said witness considerable money for various pets "mostly parrots"; that he had at the time of the trial paid him all

of the money due and owing; that said witness had filed an action against him in the small claims court to compel payment [Tr. 439-440].

As to witness Beagle, appellant testified to the writing of the letter of explanation to said witness [Deft. Ex. G, Tr. 440-441].

As to witness Weeks, appellant testified that he received an order which he had not filled; that he had partly repaid the amount due and owing and was at the time of the trial paying $5.00 a week on said obligation to a collection agency [Tr. 442].

Appellant further testified that he came to this country from England in 1947; that he borrowed $500.00 from his mother to commence his business [Tr. 419]; that the business eventually developed into a wholesale business; that he started importing and exporting regularly; that various problems kept arising which affected the financial status of the business [Tr. 420-421]; that Pan American Airlines placed an embargo on monkey shipments thus cutting off his source of supply [Tr. 421-423]; that the business had not been profitable enough to support a large stock; that he had difficulties in obtaining employees; that he worked 7 days a week, 52 weeks a year [Tr. 423-424]; that he felt very bad about owing money to people; that he had never intended in his life to keep money that did not belong to him [Tr. 424]; that, if he had a plan or intent to defraud anyone, he would not work out a plan "to deceive people of $4.00 and $5.00 and $5.50, even to the total amount of $600.00 or $800.00"; that nobody invents a plan and works unprofitably at it for 7 days a week; that he still works hard at the busines to make it a success [Tr. 444-445]; *that he never advertised anything that he did not have in stock at the time* [Tr. 449,

451, 455, 478]; that he had his price list printed to list all animals handled in the regular course of business; that some of the animals on the list would not be in stock from time to time; that said list did not have any inscription on it "IN STOCK FOR IMMEDIATE SHIPMENT" [Tr. 467]; that he had, during the Pan American Airways embargo period, developed some additional sources of supply for South American monkeys [Tr. 471].

Of significance in this matter is appellant's statement covering his business difficulties wherein he said at page 460 of the transcript:

> "I would like you to understand the problem I have in a particular case like this. I admit it is bad business not to take better care of orders or have easier orders. You might call it bad business. I don't know. I am not sure. It isn't an ideal way of running a business and I wish I could change this one deal.
>
> "But the fact is here, Mr. Sherman, that I have here an order to ship, which I do myself. Every shipping box I let go out is made up by myself. It is figured up by myself and the food is put in by myself and I take great care that the animals arrive in perfect condition.
>
> "I would estimate that every shipping box, whether there are six turtles or a hundred hamsters or two monkeys, or whatever it is, that it takes me probably between—writing the bill of lading, nailing it shut, putting perches in for birds, it probably takes me between half an hour and one hour. I have never had my girls close these boxes. I do it myself. I am careful to put the label on so it doesn't get lost. You can see the amount of time that is involved."

In cases such as this one where the presence or lack of fraudulent intent is in issue, the state of mind of the defendant is seldom if ever proved by direct evidence, but rather it must be proved almost entirely by circumstantial evidence. As stated by this Honorable Court in

> *Remmer v. United States* (9th Cir., 1953), 205 F. 2d 277, 288:

> "A state of mind can seldom be proved by direct evidence but must be inferred from all the circumstances."

"Direct evidence" has been variously defined in 31 Corpus Juris Secundum 505-506 as—

> "* * * evidence which if believed proves the existence of the fact in issue without any inference or presumption"

as evidence which—

> "* * * describes disputed circumstances, leaving no room for deduction or inference"

and as meaning—

> "* * * that which immediately points to the question at issue, or is evidence of the precise fact at issue and on trial, by witnesses who can testify that they saw the act done, or heard the words spoken which constitute the facts to be proved."

See also:

> *Sullivan v. Mountain States Power Co.,* 139 Ore. 282, 9 P. 2d 1038;
>
> *Stern v. Employers' Liability Assur. Corporation Limited of London, England,* .... Mo. ....., 249 S. W. 739;
>
> Witkin, *California Evidence,* 131-132.

The following definition of circumstantial evidence is given in 31 Corpus Juris Secundum 871:

> "Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist."

Based upon the foregoing, it is apparent that the government's entire case was founded upon circumstantial evidence. Nowhere in the testimony is there any evidence "which if believed proves the existence of the fact in issue [fraud] without any inference or presumption." (31 C. J. S. 505, *supra.*) Appellant's guilt of the crime charged to him could be established from the foregoing testimony only by way of inference, thus coming within the foregoing definition of circumstantial evidence. The act of appellant in putting advertisements in magazines or sending them directly through the mails is not in itself indicative of fraud inasmuch as it is a normal action for any person engaged in a legitimate mail order business. This is not altered by the fact that the advertisements represented that the animals were "In Stock for Immediate Shipment" and that "Deposits may be refunded on orders which cannot be filled within 45 days," these being representations which would regularly be used in any legitimate operation. The same may be said of the fact that appellant acknowledged by way of the mails the various orders received by him. Finally, appellant's failure to fill the orders of, or return the money to, the various government witnesses, while reprehensible, is not in itself conclusive of fraud. The exigencies of running a small under capitalized mail order business could well result in such failures without any intent to defraud on the part of appellant. It is only when all of these factors are considered together that the inference can be drawn therefrom

that, because of the number of transactions and the apparent *modus operandi,* they were the result of some scheme or artifice to defraud. Appellant's state of mind then is, from the standpoint of the government's case established inferentially and not directly.

The only direct evidence bearing on appellant's state of mind was supplied not by the government but by the defense itself. Appellant repeatedly denied that his actions were prompted by fraudulent intent and laid his failure either to fill the orders or rebate the money to the fact that at the particular time he was financially unable to do so [Tr. 406, 407, 411, 412, 416, 418-424, 425, 427, 431, 432-434, 435, 436, 437, 438, 439]. In addition, appellant stated that his only reason in using the mails to send advertisements was to do more business and that such action was not undertaken pursuant to any plan or scheme to defraud [Tr. 444-445]. These statements by appellant constituted as aforesaid direct evidence since, if believed, they prove appellant's state of mind in and of themselves directly and not by way of inference.

Appellant's testimony relative to his state of mind is uncontradicted by any direct evidence and is completely compatible with the theory of innocence which could be drawn from the government's circumstantial evidence. It, however, is completely inconsistent with the interpretation of guilt which was placed upon said circumstantial evidence by the court in finding appellant guilty as charged. In ignoring appellant's direct denial of fraudulent intent and in drawing by inference, from the government's circumstantial evidence, a theory of guilt, the trial court arbitrarily and capriciously disregarded uncontradicted direct evidence in favor of ambiguous circumstantial evidence. This was error.

It is established that uncontroverted evidence which is not improbable or unreasonable cannot be disregarded even if it comes from an interested witness; and, unless it is shown to be untrustworthy, it is conclusive. As stated in

32 C. J. S. 1089, *et seq.*:

> "Uncontradicted or undisputed evidence should ordinarily be taken as true. More precisely, evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously discredited, disregarded, or rejected, even though the witness is a party or interested; and, unless shown to be untrustworthy is to be taken as conclusive, and binding on the triers of fact; * * *"

The foregoing statement of law is correlative to the rule that the existence of a fact may not be proved by circumstantial evidence which is consistent with uncontradicted direct evidence denying the existence of the fact. In such a case, the fact the existence of which is sought to be proved does not exist. A succinct statement of this rule is contained in

32 C. J. S. 1101-1102:

> "* * * but circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion, or where the circumstances give equal support to inconsistent conclusions, or are equally consistent with contradictory hypotheses. *A fact cannot be established by circumstances which are perfectly consistent with direct, uncontradicted, and unimpeachable testimony that the fact does not exist.*" (Emphasis added.)

The rationale behind the foregoing rule is that circumstantial evidence proves the fact in issue only by inference.

A fact may be proved by inference when the inferences are not contradicted by direct and percipient evidence. Where even a scintilla of contradicting direct evidence is present, the inference must fall. In

> *Arnall Mills v. Smallwood* (C. C. A. 5th, 1933), 68 F. 2d 57,

the court stated at page 59:

> "Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence."

In

> *Ariasi v. Orient Insurance Co., et al.* (C. C. A. 9th, 1931), 50 F. 2d 548,

the defendant in error sought to show as a defense in the trial court that plaintiff in error had an unlawful intent in using certain insured property. The proof of this position was attempted by inference from circumstantial evidence. This Honorable Court, in rejecting the foregoing contention, stated at page 552:

> "The difficulty with this claim is that, although this conclusion was required, in the absence of any evidence to the contrary, the prima facie effect of the revocation is dissipated by positive evidence to the contrary. It does not constitute evidence to be placed in the scale, and weighed, as against the positive evidence of the plaintiff to the effect that he did not intend to violate the law and had not done so."

> *Pennsylvania R. Co. v. Chamberlain* (1933), 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;
>
> *Winn v. Consolidated Coach Corporation* (C. C. A. 6th, 1933), 65 F. 2d 256, 257.

The fact in issue here being appellant's state of mind, under the reasoning of the foregoing authorities, any inferences of fraudulent intent which might be drawn from the government's circumstantial evidence are completely and conclusively rebutted by the direct evidence of the appellant that he performed the various acts testified to by the government's witnesses in the normal innocent course of his business and not as a result of any fraudulent scheme, device, or artifice. The court below, therefore, committed error in inferring appellant's guilt from the government's circumstantial evidence, in complete disregard of appellant's direct evidence which, not only denied any fraudulent intent, but also was completely consistent with innocent inferences which could be drawn from the government's evidence.

As heretofore stated, the government's entire case was based upon circumstantial evidence. The various government witnesses testified to transactions with appellant in which many of them sent orders to appellant in response to his advertisements and received neither the ordered goods nor a refund of their money. From these facts the government by inference alleged, and the court below so held, that appellant's acts established a scheme or artifice on his part to defraud. Appellant on the other hand, while admitting the acts, explained that they were not the result of a scheme to defraud but merely the result of his financial inability to pay coupled with careless business practices. This latter inference could as easily be drawn from the testimony of the government witnesses as could the inference of guilt adopted by the court below. It is appellant's contention that the court in adopting the inference consistent with guilt and rejecting the inference consistent with innocence committed error. It is established beyond question that in cases such as the instant case, where guilt

is sought to be established by circumstantial evidence and the evidence is as consistent with innocence as with guilt, it is the duty of an appellate court to reverse a judgment of conviction.

While appellant has been unable to find any law on this point in the Seventh Circuit, the proposition is abundantly established in the other ten circuits including the Ninth Circuit. In

> *Ayala v. United States* (C. C. A. 1st, 1920), 268 Fed. 296,

the First Circuit stated at page 300:

> "* * * we do not think that, when inferences as consistent with innocence as with guilt may be drawn from the proven facts, it can be said that there was substantial evidence to support a verdict of guilty."

In

> *Nosowitz, et al. v. United States* (C. C. A. 2d, 1922), 282 Fed. 575,

Judge Manton, speaking for the Second Circuit, stated at page 578:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error."

In

> *Graceffo v. United States* (C. C. A. 3rd, 1931), 46 F. 2d 852, 853,

it is said:

> "It has been held by a long line of decisions in substance that, unless there is substantial evidence of

facts which exclude every other hypothesis other than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused. (Citing cases.)"

In

Garst v. United States (C. C. A. 4th, 1910), 180 Fed. 339,

the Fourth Circuit states at page 343:

"The rule in regard to circumstantial evidence is that all the essential facts and circumstances shown in evidence must be consistent with the defendant's guilt and inconsistent with every other reasonable hypothesis."

In

Kassin v. United States (C. C. A. 5th, 1937), 87 F. 2d 183,

the Fifth Circuit stated at page 184:

"Circumstantial evidence can indeed forge a chain of guilt and draw it so tightly around an accused as almost to compel the inference of guilt as matter of law. Again, circumstantial evidence may forge the chain and draw it tight by legally justifiable, rather than absolutely compelling, inferences. In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence."

The rule was succinctly enunciated by the Sixth Circuit in

> *Tucker v. United States* (C. C. A. 6th, 1915), 224 Fed. 833, 837,

as follows:

> "* * * if we can say that the testimony, taken together, was as consistent with defendant's innocence as with his guilt it will be our duty to reverse."

More than any other circuit the Eighth Circuit has repeatedly relied upon the foregoing rule of law. Thus in

> *Salinger v. United States* (C. C. A. 8th, 1927), 23 F. 2d 48, 52,

it is stated:

> "Unless there is subtstantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused."

The rule has been adopted by this circuit in

> *Ferris v. United States* (C. C. A. 9th, 1930), 40 F. 2d 837,

wherein this Honorable Court stated at page 840:

> "Where, as in this case, circumstantial evidence is relied upon to support a verdict of guilty, all the circumstances so relied upon must be consistent with each other, consistent with the hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence."

Again in

Karn v. United States (C. C. A. 9th, 1946), 158 F. 2d 568,

Judge Bone, speaking for this Honorable Court, said at page 570:

"The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt."

In

Paddock v. United States (C. C. A. 9th, 1935), 79 F. 2d 872, 875, 876,

this court stated:

"The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett Instructions to Juries, §2491, et seq."

See also:

McLaughlin v. United States (C. C. A. 3rd, 1928), 26 F. 2d 1;

Grant v. United States (C. C. A. 3rd, 1931), 49 F. 2d 118;

Harrison v. United States (C. C. A. 6th, 1912), 200 Fed. 662;

Union Pacific Coal Co. v. United States (C. C. A. 8th, 1909), 173 Fed. 737;

Isbell v. United States (C. C. A. 8th, 1915), 227 Fed. 788;

Sullivan v. United States (C. C. A. 8th, 1922), 283 Fed. 865;

Willsman v. United States (C. C. A. 8th, 1923), 286 Fed. 852;

Grantello v. United States (C. C. A. 8th, 1924), 3 F. 2d 117;

Edwards v. United States (C. C. A. 8th, 1925), 7 F. 2d 357;

Bishop v. United States (C. C. A. 8th, 1926), 16 F. 2d 410;

Beck v. United States (C. C. A. 8th, 1929), 33 F. 2d 107;

Gold v. United States (C. C. A. 8th, 1929), 36 F. 2d 16;

Stoppelli v. United States (9th Cir., 1950), 183 F. 2d 391, dissenting opinion of Judge Denman, pp. 395-398;

Woodard Laboratories, Inc., et al. v. United States (9th Cir., 1952), 198 F. 2d 995;

Leslie v. United States (C. C. A. 10th, 1930), 43 F. 2d 288;

Douglas v. United States (D. C. Cir., 1956), 239 F. 2d 52;

23 C. J. S., Criminal Law, Sec. 907, pp. 151-152.

As heretofore stated, appellant's guilt was inferred in the court below from the following general facts: that he advertised animals for sale; that in his advertisements he stated that they were in stock for immediate shipment and that deposits might be refunded on orders not shipped within 45 days; that money was sent to the ap-

pellant; that the orders were not filled in some cases and in an even lesser number of cases the money was not refunded. While it is true that a fraudulent scheme could be inferred from such actions by appellant, it is at least equally true that these facts are susceptible to an inference consistent with innocence as urged by appellant.

To understand appellant's explanation that he intended to fill all of the orders and was prevented from so doing by business reverses and by stoppage of his source of supply it is necessary first to understand some of the problems peculiar to the operation of a mail order animal business. Any business which stimulates its sales by extensive advertising has a certain area of uncertainty as to just how great the response will be to any given advertisement. If, for instance, a person indulges in direct mail advertising, it is impossible to know whether 1 percent, 10 percent, or 50 percent of the persons circularized will order in reliance on the advertisements. In businesses where inanimate merchandise is being sold this problem, while important, is probably not too acute inasmuch as one could safely stock merchandise equal to the largest anticipated demand and, in the event that a lessor volume of orders was received than anticipated, could store the remaining stock until the next advertising campaign. This is not true where animate merchandise such as that handled by appellant is concerned. Obviously, if a person offers animals for sale by direct mail advertising or extensive advertising in periodicals and in response to the advertising campaign all or substantially all of the animals are not sold, the business assumes the overwhelming financial burden of feeding and caring for the animals in question until they can be disposed of by other means. Nor is this risk present in the normal retail pet shop operation. There sales depend upon direct contact. One either has

or does not have certain animals when the customer comes in the store. As a result the stock on hand can be kept to a bare minimum. Appellant, as a mail order stock dealer, was subject to the uncertainties of direct mail and periodical advertising. While he stated [Tr. 449] that *he never advertised anything that he did not have in stock at the time of the advertisement,* there was always a considerable area of dubiety as to the response which would result. Appellant, having 10 monkeys in stock and advertising monkeys as being in stock for immediate delivery, might receive 100 orders or he might receive no orders. The solution to this problem which was adopted by appellant was to fill the orders to the extent of his available stock and, in the event of a surplus of orders, rely upon his established sources to augment his depleted stock.

Therefore, when appellant was sold out of certain advertised animals and he received additional orders for the same, it did not follow that he would not be able to fill the orders either through his primary source of supply or through other purchases. In the normal course of his business, under such circumstances he would deposit the payment received with the order and then attempt to replenish his stock to fill the order. While this may leave something to be desired as far as business methods are concerned, his failure in some cases either to fill the order or rebate the money was the result of poor financial condition and not of a fraudulent scheme or device. It is, of course, established that the good faith of the defendant is a complete defense to a charge of mail fraud.

> *Durland v. United States* (1896), 161 U. S. 306, 40 L. Ed. 709;
>
> *Gold v. United States* (C. C. A. 8th, 1929), 36 F. 2d 16, 32.

Basically the major *indicium* relied upon by the government to show fraud on the part of appellant is appellant's failure to make restitution on unfilled orders. A similar situation was presented in

> *Harrison v. United States* (C. C. A. 6th, 1912), 200 Fed. 662, *supra,*

in which the Sixth Circuit, speaking of the defendant's advertising promises, stated at page 670:

> "Accordingly he thereupon, and about July, 1908, changed his literature so as to contain this absolute promise of refund, and (with such degree of approval from the Post Office Department as may be implied from these facts) he continued to use this literature until his arrest. In other words, it appears that, even if there might be any intent to get the purchaser's money by creating a misleading impression regarding the article to be received by him, it was accompanied by a promise, and by the legal liability to return the money, if, when the purchaser saw the article, he was not satisfied. We quite agree with the Post Office Department that *this promise to refund, if made in good faith and taken in connection with the literature here used, would leave no room for the conclusion that the scheme, upon the whole, was one to defraud;* * * *" (Emphasis added.)

As stated in

> *Evans v. United States* (1894), 153 U. S. 584, 592, 38 L. Ed. 830, 833:

> "The case is not unlike that of purchasing goods or of obtaining credit. If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment."

See also:

Brow v. United States (C. C. A. 8th, 1906), 146 Fed. 219.

The good faith of appellant in making his promise to refund on orders not filled within 45 days can best be judged by the fact that in the period from 1955 through the first 2 months of 1957 appellant did a gross dollar volume business of $74,808.20 [Tr. 402, 404, 405]. During the same period appellant refunded $1,040.58 to persons whose orders he could not fill (Appendix B). Appellant failed to refund only $775.70, which when related to a gross dollar volume of approximately $75,000.00 does not justify an inference of fraud. It is submitted by appellant that in the premises, where nearly 99 percent of his business transactions were legitimately carried on, his evasion of a duty to pay back moneys received from approximately 1 percent of his customers, while creating civil liability to those customers, is not conclusive of fraud. His business was a unified operation dealing as it did in only one type of transaction, viz., sale of pets, and his intent was always to fill the orders or return the money. It is established that where the dominant purpose of a business is lawful an allegation of fraud in the conduct of a subservient portion thereof tends to be negated. Thus in

Estep v. United States (C. C. A. 10th 1943), 140 F. 2d 40,

it is stated at page 44:

> "If the dominant purpose and object of the enterprise was to engage in legitimate mining operations, and the sale of the mining stock was purely subordinate to that end, such purposes lend themselves to legitimacy, and tend to deny criminal intent."

See also:

Gold v. United States (C. C. A. 8th, 1929), 36 F. 2d 16, 32, *supra;*

Corliss v. United States (C. C. A. 8th, 1925), 7 F. 2d 455, *supra;*

Mandelbaum v. Goodyear Tire & Rubber Co., et al. (C. C. A. 8th, 1925), 6 F. 2d 818;

Harrison v. United States (C. C. A. 6th, 1912), 200 Fed. 662, *supra.*

Additionally, it should be noted that appellant designated business adversity as the primary cause for his defalcations. In this connection the language of the Eighth Circuit in

Gold v. United States (C. C. A. 8th, 1929), 36 F. 2d 16, *supra,*

is particularly pertinent wherein it is stated at page 32:

> "Business adversity, especially in times of abnormal business conditions, does not necessarily spell fraud."

See also to the same effect:

Corliss v. United States (C. C. A. 8th, 1925), 7 F. 2d 455, *supra;*

Harrison v. United States (C. C. A. 6th, 1912), 200 Fed. 662, 671, *supra.*

In the premises appellant was not guilty of fraud.

Conclusion.

The Honorable Judge Weinberger erred in not granting appellant's motion under Rule 17(b), Title 18, U. S. C. A., *supra,* to subpoena certain witnesses at the government's expense. Appellant's affidavit in support of

said motion was sufficient and the Honorable District Judge erred in equating the word "indigent" into "pauper." Although not completely destitute, appellant was an indigent within the meaning of said rule inasmuch as he could not pay the three to four thousand dollars necessary to bring said witnesses to the trial and still support, after payment, those having a claim upon him for support. The failure of the Honorable Judge Weinberger to grant appellant's motion worked severe prejudice upon him in that he was forced to enter into a disadvantageous stipulation to secure the testimony of any of his witnesses. This in all but one case effectively deprived him of his right to cross-examination.

The case of the government relied entirely upon circumstantial evidence. There was no direct evidence introduced by the government on the salient question of appellant's state of mind. The appellant, however, directly testified that he had no intent to defraud. Where the existence of a fact is sought to be proved inferentially from circumstantial evidence, the fact does not exist if its existence is denied by direct evidence which is not incompatible with the aforesaid circumstantial evidence. Appellant did not deny the commission of the various acts testified to by the government's witnesses; he did and does deny, however, that they were done with a fraudulent intent. He explains that his defalcations resulted from poor business methods and the inherent nature of the mail order pet business rather than from any scheme or artifice to defraud. There was nothing in the government's evidence which rebutted appellant's explanation. A conviction based upon circumstantial evidence as consistent with innocence as with guilt must be reversed.

An affirmance of this conviction will place in jeopardy of criminal prosecution every mail order sales enterprise in this country.

Appellant's position is best summarized in his own words [Tr. 444-445]:

> "* * * If I may say this: If I had had a plan or an intent to defraud anybody, I can't see anybody that would work out a plan to deceive people of $4.00 and $5.00 and $5.50, even to the total amount of $600.00 or $800.00.
>
> "Also I say I have been struggling. Nobody invents a plan, I believe, and works seven days a week. On top of this I should have found out after a year this plan didn't work. If it has been a plan, it didn't work. I am just as short of funds as I have been, * * *"

Of interest in this connection are the words of Judge Yankwich in

> *United States v. Corlin* (D. C. S. D. Calif., C. Div., 1942), 44 Fed. Supp. 940, 949:
>
> "But when the Government, to prove bad faith, seeks to show what was realized from the sales, losses resulting to the selling concern are as important on the question of good faith. For a going real estate concern would not, ordinarily engage, over a period of years, in a *losing enterprise,* if its object be fraud." (Emphasis original.)

In the premises, appellant urges that this Honorable Court must reverse the judgment of conviction upon which he presently stands committed.

Respectfully submitted,

Thomas H. Ludlow, Jr.,

Attorney for Appellant.

Footnotes.

[1]Witness Youngclause did not testify to having seen an advertisement before he ordered [Tr. 9]. Witness Coon testified to having seen an advertisement for monkeys in the July, 1955, issue of "All Pets" magazine [Tr. 20]. Witness Longley testified that in the July, 1955, issue of "All Pets" magazine he saw an advertisement of appellant offering foxes for sale [Tr. 28]. Witness Hockett testified that in September, 1955, he saw appellant's advertisement in "All Pets" magazine, advertising finches for sale [Tr. 39]. Witness McCrary did not explain in her testimony how she happened to learn of appellant's operation but merely stated that, pursuant to her written request, she received a price list from appellant [Tr. 41]. Witness Pefley testified that in May, 1956, he saw appellant's advertisement in a copy of "All Pets" magazine, advertising California chipmunks and guinea pigs for sale [Tr. 47-48]. Witness Rye stated that he received a post card price list from appellant, advertising California chipmunks and golden hamsters for sale [Tr. 51]. Witness Hagerman testified that in July, 1956, he saw appellant's advertisement in "Popular Mechanics" magazine advertising baby monkeys for sale [Tr. 54]. Witness Dooley testified that in July and October of 1956 she received appellant's post card advertisements through the mails [Tr. 57-58]. Witness Beagle did not state how it came about that he happened to send an order to appellant [Tr. 63-64]. The testimony of witnesses Elsinger and Coleman was refused inasmuch as their transactions occurred outside the indictment period [Tr. 64-68]. Witness Cameron testified that he received from appellant through the mails a price list, advertising Mynah birds and parrots [Tr. 68]. By omnibus stipulation, it was stipulated that witnesses Wallingham, Beecher, Weeks, Herman, Price, Cox, Moreno, and Allen each saw an advertisement of the appellant, advertising birds and animals for sale [Tr. 76-77]. Witness Morrison testified that he received a post card advertisement through the mails from appellant [Tr. 79]. The testimony of all the foregoing witnesses was entered by stipulation. The following witnesses actually testified in court: Witness Smith testified that he received a price list through the mails from appellant [Tr. 105]. Witness Champlin testified that in March, 1955, he saw appellant's advertisement for Rhesus monkeys in "All Pets" magazine [Tr. 122-123]. Witness Frankenfield testified that in February, 1957, she saw appellant's advertisement for California chipmunks in an old issue of "All Pets" magazine [Tr. 159-160]. Witness Christiansen testified that in September of 1956 she saw a post card advertisement of appellant's for chipmunks and kangaroo rats [Tr. 181-182]. Witness Combs testified that on May 22, 1957, he received an advertisement for Mynah birds through the mails from appellant [Tr. 191-192].

[2]Witness Youngclaus [Tr. 11]; witness Coon [Tr. 23, Ex. 16]; witness Longley [Tr. 30, Ex. 21].

Witness Hockett did not testify to having received any price list stating that money would be refunded if the order was not filled within 45 days; nor did he testify that plaintiff had represented to him that Parson finches and Gouldian finches were in stock for immediate shipment [Tr. 39-40].

Witness McCrary [Tr. 41-42, Ex. 27; Tr. 47, Ex. 32]; witness Pefley [Tr. 49, Ex. 35]; witness Rye [Tr. 51, Ex. 37].

Witness Hagerman did not testify that appellant had represented that baby monkeys were in stock for immediate shipment or that money would be refunded on orders not filled within 45 days [Tr. 54-57].

Witness Dooley [Tr. 57, Ex. 42; Tr. 58, Ex. 43; Tr. 59-60, Ex. 45; Tr. 61-62, Ex. 46-A].

Witness Beagle did not testify that appellant represented that California chipmunks, golden hamsters, albino hamsters, or horned toads were in stock for immediate shipment, nor did he testify that appellant represented money would be refunded on orders not filled within 45 days [Tr. 63-64]. The proffered testimony of witnesses Elsinger and Coleman was refused by the court [Tr. 64-68]. See footnote 1, *ibid.*

Witness Cameron [Tr. 68].

Witnesses Wallingham, Beecher, Weeks, Herman, Price, Cox, Moreno and Allen, whose testimony was covered by the aforesaid omnibus stipulation (footnote 1, *ibid.*) [Tr. 76-78] did not testify that appellant had represented that the pets involved in their respective transactions were available for immediate shipment nor that he would refund money on orders not filled within 45 days.

Witness Morrison [Tr. 79-80, Ex. 59; Tr. 81, Ex. 61]; witness Smith [Tr. 105-106, Ex. 2; Tr. 118, Ex. 72]; witness Champlin [Tr. 130].

Witness Frankenfield did not testify that chipmunks were ordered pursuant to a representation by appellant that they were in stock for immediate shipment or that money would be refunded on orders not shipped within 45 days [Tr. 158-180].

Witness Christiansen [Tr. 182; Tr. 189, Ex. 72]; witness Combs [Tr. 191. Ex. 94; Tr. 201, Ex. 96; Tr. 202, Ex. 97].

[3]Witness Youngclaus [Tr. 11-12]; witness Coon [Tr. 21]; witness Langley [Tr. 30]; witness Hockett [Tr. 39]; witness McCrary [Tr. 43]; witness Pefley [Tr. 48]; witness Rye [Tr. 52]; witness Hagerman [Tr. 55]; witness Dooley [Tr. 59-60]; witness Beagle [Tr. 53]. The testimony of witnesses Elsinger and Coleman was offered and rejected (footnote 1, *op. cit.*)

Witness Cameron [Tr. 68-69]; witnesses Wallingham. Beecher, Weeks, Herman, Price, Cox, Moreno and Allen [Tr. 77]; witness

Morrison [Tr. 79]; witness Smith [Tr. 110]; witness Champlin [Tr. 126-127]; witness Frankenfield [Tr. 162, 167]: witness Christiansen [Tr. 182-183]; witness Combs [Tr. 194].

[4]Witness Youngclaus [Tr. 9, 10, 12]; witness Coon [Tr. 21-22].

Witness Hockett did not testify to having received an acknowledging letter from appellant [Tr. 39-40].

Witness McCrary [Tr. 43-44]; witness Pefley [Tr. 49].

Witness Rye did not testify to receiving an acknowledging letter from appellant [Tr. 50-53].

Witness Hagerman [Tr. 55-56]; witness Dooley [Tr. 61]; witness Beagle [Tr. 64].

Witnesses Wallingham, Beecher, Weeks, Herman, Price, Cox, Moreno and West did not testify to receiving a letter of acknowledgment from appellant [Tr. 76-78].

Witness Morrison [Tr. 79-80]; witness Smith [Tr. 112].

Witness Champlin did not testify to receiving a letter of acknowledgement from appellant; however, he did testify to having had considerable correspondence and conversation with appellant regarding the order [Tr. 121-154].

Witness Frankenfield [Tr. 165]; witness Christiansen [Tr. 184].

Witness Combs testified that he did not receive any reply to his order [Tr. 195]. However, this witness had considerable correspondance and conversation with appellant relative to the filling of his order [Tr. 190, 225].

[5]Witness Youngclaus [Tr. 18]. However, this witness has received $87.50 worth of other animals in return for his payment of $90.00 [Tr. 425-426]. Witness Coon [Tr. 27]; witness Longley [Tr. 37]; witness Hockett [Tr. 39-40]; witness McCrary [Tr. 46]; witness Pefley [Tr. 50]; witness Rye [Tr. 52]; witness Hagerman [Tr. 56-57]; witness Dooley [Tr. 61]; witness Beagle [Tr. 64].

Witness Cameron has had his full payment of $122.50 restituted [Tr. 73].

Witnesses Wallingham, Beecher, Weeks, Herman, Price, Moreno and Allen [Tr. 77]. Appellant is paying off his indebtedness to witness Weeks at the rate of $5.00 a week [Tr. 442]. Witness Morrison [Tr. 81]; witness Smith [Tr. 117]; witness Champlin [Tr. 146]; witness Frankenfield [Tr. 171]; witness Christiansen [Tr. 189]; witness Combs [Tr. 201].

APPENDIX "A"

Government Witnesses

ess	Exhibits Introduced	Indictment Witness	Stipulation Witness	Paid to Appellant	Repaid by Appellant	Witness Testified at Tr. Pages	Transaction Explained by Appellant at Tr. Pages
gclaus	1-12	Yes	Yes	$ 90.00	$ 87.50	8-19	425-426
	13-18	No	Yes	117.50	....	20-28	438-439, 469
ey	19-24	No	Yes	12.50	....	28-38	....
ett	25	Yes	Yes	22.00	....	39-41	416-424
ary	26-32	No	Yes	30.00	....	41-47	....
/	33-36	Yes	Yes	10.00	....	47-50	432-434
	37-38	Yes	Yes	6.00	....	50-53	435, 453-455
rman	39-41	Yes	Yes	22.50	....	53-57	428-430
y	42-46A	Yes	Yes	27.50	....	57-63	427
e	47	No	Yes	11.20	....	63-64	441, 460
ger	48-55 Rejected	No	Yes	....	....	64-67	....
an		No	Yes	....	....	67-68	....
ron	56	No	Yes	122.50	122.50	68-73	439
igham er es ian c r rio e		No	Omnibus Stipulation	228.75	(per week 5.00)	73, 76-78	442
rson	57-61	Yes	Yes	30.00	....	79-82	431-432
r	62-65	......	No	(of "Popular Mechanics")		83-98	....
nberg	67-69	......	No	(of "All Pets")		98-104	....
1	70-72	No	No	16.25	....	105-121	....
olin	73-86	Yes	No	200.00	....	121-154	406-412
enfield	87-90	Yes	No	5.50	....	158-180	436-437
iansen	91-93	No	No	14.00	....	180-189	....
	94-97	No	No	55.00	....	190-225	....
lund	......	......	No	(of Better Business Bur.)		227-243	....
an	......	......	No	(Postal Inspector)		243-297	....

APPENDIX "B."

List of Refunds.

ed	Date Refunded	Amount	Refunded to	Tr.
, 1955	Nov. 27, 1955	$ 32.50	Pet House, Santa Barbara, Cal.	
	Oct. 1955	50.00	Pet Cupboard, Evergreen Park, Ill.	
	Oct. 2, 1955	25.00	Granada Pet Shop, L. A.	
	Jan. 17, 1956	40.00	Parakeet Haven, Dayton, O.	
	Dec. 9, 1955	4.00	Orinda Pet Shop	
	Mar. 26, 1956	32.50	Mr. and Mrs. Hays, Carlsbad, N. M.	
. 1956	Oct. 16, 1956	20.00	W. E. Bryant, Ontario, Cal.	
	Feb. 26, 1956	65.00		
	Oct. 15, 1956	95.00	Factors Pet Shop, Cheyenne, Wyo.	
		50.00	Mrs. N. Wolmuth, Denver, Colo.	
1956	Feb. 26, 1956	65.00	Pet & Pigeon Center, Sacramento, Cal.	375
	April 7, 1956	105.00	Gooney Birds Pet Shop, Honolulu, T. H.	
4, 1956	June 17, 1956	10.00	Golden Case Pet Shop, San Diego, Cal.	
1956	July 28, 1956	15.00	Fish of the Tropics, L. A.	
1956	Feb. 1957	25.00	Virginia McCleery, Palm Springs, Cal.	
1956		82.50	Bernard Fink, Monterey, Cal.	
1956	May 19, 1956	37.50	Eva Christiansen, Kennewick, Wash.	
	May 23, 1956	90.00	Lodi Pet Shop, Lodi, Cal.	
955	Aug. 13, 1956	65.00	Opal Cliffs Pet Shop, Santa Cruz, Cal.	
	Jan. 24, 1957	5.50	Larry Kaufman, Humboldt, Kan.	
	Feb. 21, 1957	3.50	Ann Oberman, Dubuque, Ia.	
		122.50	Pastime Specialties	
		$1,040.50		

Appellant testified that there could be other refunds not listed here [Tr. 382-383]. Evidently the court below also gained this impression [Tr. 383].

In addition appellant pays witness Weeks $5.00 per week [Tr. 442].

No. 16244

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Eric O. Sonntag,

Appellant,

vs.

United States of America,

Appellee.

APPELLEE'S BRIEF.

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FILED
MAR 14 1959
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 16244

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Eric O. Sonntag,

Appellant,

vs.

United States of America,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of all counts of an eleven-count indictment charging him with mail fraud in violation of Title 18, U. S. C., Section 1341 [T. 2, *et seq.*].[1] Said indictment charges, in substance, that prior to January 26, 1955, and continuing to February 19, 1958, the appellant devised, and intended to devise, a scheme and artifice to defraud persons who desired to purchase pets, and persons who operated shops selling pets, by means of certain alleged fraudulent pretenses, representations, and promises, which appellant knew to be false when made; and that for the

[1]The abbreviation "T." refers to the Clerk's "Transcript of Record."

purpose of executing said scheme and artifice, appellant caused the United States mails to be used.

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California.

The jurisdiction of the District Court was based upon Title 18, U. S. C., Section 3231. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Title 28, U. S. C., Sections 1291 and 1294.

Statement of the Case.

At all times pertinent herein, appellant operated a pet shop in the City of Los Angeles, State of California, where pets and animals were sold on a retail and wholesale basis [R. 362-363].[2] As an adjunct to said business, appellant also undertook to solicit orders, through the mails, from other pet shops and the general public at large throughout the United States. This solicitation was accomplished by placing advertisements in such nationally circulated magazines as "All Pets" and "Popular Mechanics", and by mailing printed price lists, in brochure and post card form, to individual prospective customers [R. 88, 89, 101, 364]. Oftentimes, persons who answered the magazine advertisements would thereafter receive said printed price lists [R. 20-23, 28-30]. This "mail order" enterprise soon accounted for a major portion of appellant's business [R. 403-406].

These brochures invariably stated that "Deposits may be refunded on orders which cannot be filled within 45

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[2]The abbreviation "R." refers to the "Reporter's Transcript of Proceedings" of the trial.

days" [see Govt. Ex. 2, R. 11], and the post card price lists usually contained the heading "IN STOCK FOR IMMEDIATE SHIPMENT" [see Govt. Ex. 11, R. 17]. Full or half remittance was required before shipment [see Govt. Exs. 2 and 68, R. 11 and 101]. The pets offered for sale were generally always the same, although some of them were scarce and seasonal [R. 182]; and the prices quoted were generally lower than market price at the time [R. 105-106, 192-193]. These factors acted as attractions to prospectve customers [R. 182, 191-192].

At the time that appellant was advertising his animals as "in stock for immediate shipment", he knew that they might not be in stock, or readily available for shipment, when orders were placed [R. 421, 427, 432, 433, 436, 454]. He also admittedly knew that he was hampered by a lack of operating capital and debts at the time he was promising refunds in his advertising [R. 420, 423]; and that these circumstances were forcing him to use remittances received on orders to pay his current bills, and to make refunds to prior dissatisfied customers who were pressing him [R. 252].

In response to appellant's magazine and direct mail advertising, each of the persons named in the indictment, and numerous others,[3] mailed a remittance to appellant in full payment of, or as a deposit upon, advertised pets. In each case the remittance was received and retained by the appellant. In some cases appellant acknowledged receipt of the order and the remittance, at times indicating that

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[3]Evidence of 25 customers was admitted into the record. In two of these cases orders were not placed until the appellant had expressly advised the parties, who had previously made specific inquiry, that animals desired were then in stock and available for immediate shipment [R. 109, 123, 124; Govt. Exs. 70, 74].

the shipment would be made immediately or in the near future [R. 22; Govt. Exs. 70 and 74]. In other cases the order and remittance went completely unanswered (see fn. 4 to App. Op. Br.). However, none of these orders was ever filled, nor, except in one case,[4] were any refunds made.[5] Attempts to obtain the ordered merchandise or a refund met with negative results. These attempts included letters, telephone calls, telegrams, and personal visits to the appellant [R. 13, 31, 44, 71]. In many cases appellant would not reply to any of these letters [R. 14-16, 31-36, 52]. In response to others, appellant would again promise to make shipment or tender refund, but would never do so, and would thereafter ignore further letters [R. 56, 64, 184-188]. The telephone calls, telegrams, and personal visits did not fare any better [R. 44, 71-73, 196-197].

The experiences of the following customers were typical:

> Mrs. Alva H. Coon of Tucson, Arizona. wrote to the appellant on three different occasions demanding a refund before receiving a reply approximately six months later. At that time appellant requested permission to still fill the order. Mrs. Coon responded that, athough she no longer had any use for the merchandise, she would cooperate and accept the ordered animals in lieu of a refund. Thereafter, not having received any merchandise or a reply to her last letter, the witness wrote to the appellant making a final demand for refund. She never received a reply thereto. [R. 23-27.]

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[4]Witness Cameron's remittance was refunded after personal demand at appellant's place of business and institution of legal action [R. 73].

[5]After indictment and during trial appellant apparently partially refunded monies to two witnesses [R. 425, 442].

Mark Champlin of Indianola, Iowa, wrote to appellant, in response to the latter's advertisement in "All Pets" magazine, stating that he immediately needed eight Rhesus monkeys, and that if appellant had them in stock he would place an order. Appellant replied by mail that this merchandise was in stock, whereupon the witness forwarded his order and a remittance of $200. Failing to receive his merchandise, the witness telephoned the appellant and was advised that the latter did not have the monkeys, and that an immediate refund would be made. The promise to refund not having been kept, the witness again telephoned the appellant, approximately two weeks later, only to be informed that the appellant did not have money with which to make a refund. Thereafter, over a period of approximately ten months, the witness wrote innumerable letters to the appellant about his refund without satisfactory results. Finally, in April of 1956, after a prior letter had not pacified the witness, the appellant wrote to Mr. Champlin offering the same monkeys for sale at a higher price! This offer was refused, and a refund was again demanded by letter and telephone without success. Another letter to the appellant in 1957 went unanswered. By the time of trial Mr. Champlin had heard nothing further from the appellant and had not recovered his $200. [R. 122-147.]

Mr. Daniel Smith of Monterey, California, ordered monkeys from the appellant after the latter had advised him by letter that the desired merchandise was then in stock. When nothing was received after a month, the witness wrote a letter of inquiry to the appellant and received a reply stating that a refund would be made if the order could not be shipped in a few days. Failing to receive the merchandise or a refund by the specified time, the witness telephoned

> the appellant and was advised that his order would be filled by "the following Friday". When this did not materialize, another telephone call was placed to the appellant and a refund was demanded. None was ever received nor was the merchandise ever shipped. [R. 104-118.]

Contemporaneously with the foregoing events, appellant continued to advertise many of the very same animals as "in stock for immediate shipment"—oftentimes to the same individuals whose prior orders remained unfilled, and whose remittances had not been refunded [R. 16-17, 37, 47, 61, 62, 81, 118, 147, 189, 201]. During all of this period, appellant continued to operate his Los Angeles Pet Shop business, filling, when in stock, orders for local and direct over-the-counter customers, while orders for the same pets from prior out-of-town "mail order" customers went unfilled [R. 322, 323, 394, 458, 459]. The same policy was generally carried out with regard to refunds [R. 366, 370, 375].

Continual promises by the appellant to the postal authorities that he would fill the orders or make refunds were not kept [R. 264-267]. The same was true of promises to discontinue magazine advertisements and to stop direct mail advertising until appellant's affairs were in order [R. 252]. Eventually, the Postal Inspector was forced to conclude that appellant's apparent attitude of cooperation and sincerity was just an "act" [R. 278]. Thus, at a time when appellant was allegedly working in cooperation with the Postal Inspector, he laughingly told Witness Combs

that he was "scared" by Mr. Combs' advice that the witness would be forced to go to the postal authorities [R. 198, 201]. When Witness Cameron personally visited appellant at his place of business, during this same period, and demanded satisfaction, the following occurred:

> "I again demanded the birds which he had ordered or a refund and advised the defendant that if he didn't comply I would take the matter up with the authorities. The defendant then told me that there was nothing I could do; that I would merely be wasting my time and money to go to the authorities; and that if I was going to press him that way I would get nothing back. I then informed the defendant that I knew of other persons who had been taken by him and that it would not be too long before the postal authorities got around to him. The defendant replied that he didn't know what I was talking about, but that the only way I would get my money was for him to willingly give it to me." [R. 71-72.]

Appellant's attitude toward the entire affair is best expressed in his own words, which were contained in a letter written to witness Christiansen, as follows:

> "I promise you, when you have finished this letter, you will not think I am the biggest crook. I am really one of the smaller ones only." [Govt. Ex. 92, R. 184.]

After hearing the evidence and argument, the Court without the intervention of a jury, found the defendant to be guilty as charged, made special findings of fact, and entered a judgment of conviction.

Statute Involved.

The indictment in the instant case was brought under Title 18, U. S. C., Section 1341, which in pertinent part provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, * * * or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

ARGUMENT.

I.

The District Court Did Not Err in Denying Appellant's Motion to Subpoena Witnesses at the Government's Expense.

A. The Denial of Appellant's Said Motion Was a Proper Exercise of the Trial Court's Discretionary Powers.

During the time that the instant case was assigned for all proceedings to the docket of the Honorable Jacob Weinberger, United States District Judge, appellant moved the Court to subpoena defense witnesses at the Government's expense under the provisions of Rule 17(b) of the Federal Rules of Criminal Procedure [T. 18, *et seq.*]. In support thereof appellant filed affidavits and memoranda of law [T. 19-23, 29-35, 41-42]; and a counter-affidavit and memorandum of law in opposition to the motion was filed on behalf of appellee [T. 39-40, 27-28, 36-38]. At the hearing thereof, the only evidence submitted to the Court was the aforesaid affidavits of the appellant and the appellee. After stating to counsel that the burden of proof rested upon the appellant, the Court afforded appellant the opportunity to fortify his affidavit with oral testimony if he so desired [A. 32].[6] Through his counsel appellant repeatedly declined to accept this offer [A. 13, 15, 27], and offered in lieu thereof to allow the Court alone to question the appellant [A. 17].

After noting that its discretion was involved [A. 23], the Court indicated that it had reviewed the evidence before it, consisting of said affidavits and counter-affidavit bearing upon appellant's financial condition, and ruled that

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[6]The abbreviation "A" refers to the "Reporter's Transcript of Proceedings" held on June 5, 1958.

appellant did not establish to the Court's satisfaction his burden of showing entitlement to the benefits of said Rule 17(b) [A. 31-32].

Thus, the ruling of the Court was not predicated on the legal insufficiency, or lack thereof, of a particular affidavit, for the Court had before it not only the two affidavits submitted by the appellant but appellee's counter-affidavit as well.[7] Rather, the decision rendered was that, in the Court's opinion, after weighing all the evidence before it, appellant did not make a sufficient showing to the Court's satisfaction that he was a party within the Rule, and that in the exercise of the Court's discretion appellant's motion would be denied.

The United States Supreme Court and this Court have stated on innumerable occasions that the District Court has the discretionary right to deny a defense motion under Rule 17(b); and that the Court's exercise of that right is not subject to review on appeal, in the absence of an abuse of discretion. (*Crumpton v. United States,* 138 U. S. 361 (1891); *Goldsby v. United States,* 160 U. S. 70 (1895); *Dupuis v. United States,* 5 F. 2d 231 (9th Cir. 1925); *Austin v. United States,* 19 F. 2d 127 (9th Cir. 1927).) The applicability of this rule in mail fraud cases has also been recognized by the Courts. (*Reistroffer v. United States,* 258 F. 2d 379 (8th Cir. 1958); *Estep v. United States,* 251 F. 2d 579 (5th Cir. 1958).)

Appellant does not show wherein the Court below abused its discretion in denying his motion, and, in fact, he admits that no abuse was committed (App. Op. Br. p. 13). He, therefore, has no legal cause for complaint.

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[7]In making its ruling the Court expressly referred to the information pertaining to appellant's financial condition which appellee had set forth in its counter-affidavit [A. 31-32].

However, appellant does complain, arguing, in effect, that where a defendant makes an affidavit, stating in conclusionary language that he is an indigent within the meaning of Rule 17(b), the trial court, in exercising its discretion, is bound thereby and cannot inquire further. Admittedly, the trial court did not take such a limited view of its discretionary powers, and indicated that to satisfy the court, appellant would have to adduce facts showing indigency under the Rule, rather than merely state conclusions [A. 12, 14, 16].

The broad view of its discretionary powers taken by the court herein was set forth in *United States v. Kinzer,* 98 Fed. Supp. 6, 8 (D. D. C. 1951) as follows:

> "No one will deny that every reasonable effort should be made to insure a fair trial to the defendant in any criminal case, even at the expense of the government in the case of an indigent defendant. However, it is equally evident that in permitting indigent defendants to proceed in forma pauperis under the provisions of 28 U. S. C. §1915, the courts must protect the public from having to pay unnecessarily heavy costs on behalf of such defendants, and in the exercise of their discretion should refuse to authorize expenditures unless there is a showing of merit and necessity in the defendant's application. Adkins v. E. I. DuPont De Nemours & Co., 335 U. S. 331, 337, 69 S. Ct. 85, 93 L. Ed. 43."

A recent Eighth Circuit mail fraud case stated the applicable rule as follows:

> "It is well settled that Rule 17(b), Federal Rules of Criminal Procedure, 18 U. S. C. A., under which the motion for subpoena was made, does not accord the indigent defendant an absolute right to subpoena witnesses at government expense. There is and must

be wide discretion vested in the District Court to prevent the abuses often attempted by defendants."

Reistroffer v. United States, 258 F. 2d 379, 396 (8th Cir. 1958).

Thus, even where a defendant submits an affidavit setting forth the information required by Rule 17(b), the trial court's denial of the motion, in the absence of an abuse of discretion, is final. (*Goldsby v. United States, supra; Estep v. United States, supra; Reistroffer v. United States, supra.*)

To adhere to the position urged herein by appellant would not only stringently limit the discretionary powers of the trial court, but would also obviate the necessity for any hearing of the motion on notice. On this point, Circuit Judge Hutcheson in *Thomas v. United States*, 168 F. 2d 707 (5th Cir. 1948) commenting as follows, on page 709:

"Federal Rules of Criminal Procedure, rule 17(b), 18 U. S. C. A. following section 687, under which the motion was made, does not provide for secrecy with respect to the motion and, if witnesses are to be subpoenaed at the expense of the government, it certainly would be proper that counsel for the government be advised of the motion and heard by the court in respect to it."

The case of *Adkins v. E. I. Dupont de Nemours & Co.*, 335 U. S. 331, 93 L. Ed. 43 (1948), cited by the appellant, is not contrary to the foregoing. In that case, the court merely pointed out that an affidavit drawn in the statutory language should "ordinarily be accepted . . .

particularly where unquestioned. . . ." In the case at bar, the contents of appellant's affidavit were questioned by appellee's counter-affidavit and, in reviewing the evidence before it, as contained in said affidavits, the Court resolved the motion in appellee's favor. This the Court had the discretionary right to do.

B. The Action of the District Court in Denying Appellant's Said Motion Did Not Affect Appellant's Substantial Rights.

At the trial of this case, the appellee stipulated to the testimony of each of the very witnesses which appellant had unsuccessfully sought to have subpoenaed under Rule 17(b). Thus, although the trial court properly denied appellant's attempt to have these witnesses subpoenaed, appellant was not, in the last analysis, deprived of the benefit of their evidence.

Yet, appellant contends that the court's denial of his motion violated his substantial rights by "forcing" him to obtain the testimony of his witnesses by stipulations which he now claims were unfavorable.

In *Iva Ikuko Toguri D'Aquino v. United States,* 192 F. 2d 338 (9th Cir. 1951), and in *Bistram v. United States,* 248 F. 2d 343 (8th Cir. 1957), after defense motions to subpoena certain witnesses under Rule 17(b) were denied, the testimony of said witnesses was obtained by deposition. In each case, the judgment of conviction was affirmed, this Court stating in the *D'Aquino* case at page 376:

> "In any event, the question of payment by the United States of fees and expenses of defense witnesses is one within the sound judicial discretion of

> the trial court. Meeks v. United States, 9 Cir., 179 F. 2d 319; Dupuis v. United States, 9 Cir., 5 F. 2d 231 Cf. Goldsby v. United States, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343. We find no reversible error in the action of the trial court here referred to."

Furthermore, the record itself shows the invalidity of the argument made by appellant. When appellant made his motion under Rule 17(b), the defense witnesses he requested therein had not been interviewed by him regarding their expected testimony, but their names had been selected at random from appellant's records [R. 488]. As soon as notice of the motion was served upon appellee, the Government caused each of these witnesses to be interviewed, and immediately made their full expected testimony available to appellant's counsel [A. 24]. Prior to the hearing of appellant's motion, his counsel was apprised of the testimony of numerous Government witnesses, and a stipulation of the testimony of both prosecution and defense witnesses was discussed and agreed upon, only to be finally rejected by appellant's counsel [A. 25]. Thereafter, the hearing on the motion was held, and the stipulations which were introduced into evidence at the trial were agreed upon. These stipulations contained the same material content as the prior abortive stipulations [R. 488].

Accordingly, it is submitted that appellant has in no way sustained his burden of showing that he was deprived of any substantial rights by the adverse ruling of the District Court on his motion under Rule 17(b). Rather, he has demonstrated that, through appellee's cooperation, he was able to present defense evidence which otherwise might not have been legally available to him.

II.

The Judgment of Conviction Was Supported by Substantial Evidence and Therefore Should Be Affirmed.

Appellant next contends, in effect, that there was insufficient evidence to support the trial court's finding of fact that he devised and intended to devise a scheme to defraud.

In *Woodard Laboratories v. United States,* 198 F. 2d 995, 998-999 (9th Cir. 1952), this Court enunciated the cardinal rule governing appellate reviews where such a contention is made, as follows:

> "* * * The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Glasser v. United States, 1942, 315 U. S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680. See Banks v. United States, 9 Cir., 1945, 147 F. 2d 628.
>
> "* * * Substantial evidence is '* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *.' N. L. R. B. v. Columbian Co., 1939, 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660."

The Sixth Circuit in *Battjes v. United States,* 172 F. 2d 1, 5 (6th Cir. 1949), thusly stated the rule:

> "* * * This Court in reviewing a judgment for the purpose of determining whether the evidence was sufficient to support the conviction must take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom, most favorable to the

> government, and determine therefrom whether the finding was supported by substantial and competent evidence, and where there is substantial and competent evidence, which if believed, supports the conviction, the appellate court can not weigh the evidence or determine the credibility of witnesses. Zottarelli v. United States, 6 Cir., 20 F. 2d 795; Meyers v. United states, 6 Cir., 94 F. 2d 433; United States v. Manton, 2 Cir., 107 F. 2d 834, 839; Murray v. United States, 8 Cir., 117 F. 2d 40, 44."

It is to be noted that each of the foregoing cases was tried by the trial court sitting without the intervention of a jury.

In making this determination, the appellate court cannot retry the facts. As was stated in *Stoppelli v. United States,* 183 F. 2d 391 (9th Cir. 1950), *cert. den.* 71 S. Ct. 88, at page 393:

> "* * * It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. Curley v. U. S., 81 U. S. App. D. C. 229, 160 F. 2d 229, 230."

In accord:

Remmer v. United States, 205 F. 2d 277 (9th Cir. 1953);

Charles v. United States, 215 F. 2d 831 (9th Cir. 1954);

Elwert v. United States, 231 F. 2d 928 (9th Cir. 1956).

Admittedly, the appellee relies upon circumstantial evidence to sustain the trial court's finding that appellant had the requisite intent. Regarding offenses of the instant nature, this Court has stated in *Marshall v. United States,* 146 F. 2d 618, 620 (9th Cir. 1944):

> "* * * Direct evidence is rarely available to prove a fraudulent scheme or fraudulent intent. From the very nature of the offense, it must be inferred from the facts and circumstances of the situation in question. Clarke v. United States, 9 Cir., 1942, 132 F. 2d 538, 541; Gates v. United States, 10 Cir., 1941, 122 F. 2d 571, 575.
>
> "* * * Direct proof of willful intent is not necessary. It may be inferred from the acts of the parties, and such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. It is a question of fact to be determined from all the circumstances. (Cases cited.)"
>
> *Battjes v. United States, supra,* at p. 5.

Also see:

> *Schauble v. United States,* 40 F. 2d 363 (8th Cir. 1930).

In resolving this question of fact, the trier thereof is required to weigh the actions and conduct of the defendant against his statements professing innocence. (*United States v. Freeman,* 167 F. 2d 786 (7th Cir. 1948).) In short, actions may speak louder than words. The trier may conclude that the defendant "is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third." (*Elwert v. United States, supra,* at p. 934.) Thus, in arriving at its findings the trial court, when it is the trier of the facts, must of necessity pass upon the credibility of the accused, and its deter-

mination in that regard is not a matter for review. (*Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (9th Cir. 1948); *United States v. White,* 228 F. 2d 832 (7th Cir. 1956).)

It therefore follows that a conviction may be predicated upon circumstantial evidence, even though there is direct testimony in the record of professed innocence. This was recognized in *Penosi v. United States,* 206 F. 2d 529 (9th Cir. 1953), wherein it was contended, as does appellant here, that when a conviction is based upon circumstantial evidence, the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. After noting that this precept in many cases serves no other purpose than to confuse juries, the Court stated at pages 530-531:

> "* * * If the evidence is sufficient to convince beyond a reasonable doubt that the charge is true it is immaterial whether it be circumstantial or direct. Guilt can be satisfactorily established from 'a "development and a collocation of circumstances."' Glasser v. United States, 315 U. S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680."

Also see:

Charles v. United States, supra.

Were the rule otherwise, it is apparent that a defendant's mere denial of a guilty intent would alone be sufficient to require acquittal.

In light of the foregoing applicable principles, the question herein posed to this Court may be stated as follows: Whether, taking a view most favorable to the appellee, there is substantial evidence in the record, be that evidence circumstantial or direct, from which a trier of the facts

could reasonably conclude that appellant was guilty as charged beyond a reasonable doubt.

It is submitted that the facts present in the record of this case, as heretofore set forth, do show such substantial evidence. They present a clear and consistent pattern, as found by the District Court [R. 521], of the operation of a wide-scale fraudulent mail order business within the framework of a basically legitimate local pet shop enterprise. Such an activity is clearly within the purview of the mail fraud statute. (*Stephens v. United States,* 41 F. 2d 440 (9th Cir. 1930), *cert. den.* 282 U. S. 880.)

Thus, while satisfying the demands of local on-the-scene customers, appellant operated differently when it came to dealing with his out-of-town mail order clients. With reference to said clients, as appellant admits, he would take orders for merchandise, and neither ship nor make refunds. But, contrary to appellant's contentions, the Government's evidence was not confined to these indicia of fraudulent intent. The above actions were only the results of the devised scheme. The full pattern was more extensive. It included, among other things, advertising pets for sale at deflated prices with a promise of speedy shipment or refund, at a time when appellant knew he was in no position to perform either; cashing remittances on orders, but never shipping the animals or making refunds; in the meantime, filling later local orders on the same pets; continually lulling customers with promises of future shipment or refund, which were never intended to be kept, but which served to temporarily pacify; attempting to also pacify the postal authorities with similar false promises; and attempting to advertise the same animals, making the same representations, at a time when appellant had promised the postal authorities to discontinue this practice, and

at a time when he was still advising unsatisfied customers that he could not make a shipment or refund.

These were factors to which the trial court could, and did, attach significant weight.

Appellant, of course, testified at length that he at no time had an intent to defraud, and offered explanations for his defalcations [R. 406-445]. Basically he stated, and contends here, that a major source of his animal supply was cut off by an airplane embargo, and that due to financial straits he did not have money available for refund [R. 419-423, 431].

Appellant now urges this Court to reverse his conviction on the grounds that his testimony was uncontroverted. However, the record shows otherwise. The evidence introduced by appellee proved that appellant's aforesaid pattern of fraudulent operation was initiated and was being carried on well in advance of the time that the embargo relied upon went into effect [R. 463-468]; and that said embargo did not apply to cargo service [R. 355], nor to all of the animals which appellant fraudulently failed to ship to customers [R. 447-450]. Regarding his professed inability to make refunds, appellant's own evidence demonstrated that his gross dollar-volume of business for 1955, 1956, and the first two months of 1957, was $39,626.87, $31,078.37, and $4,102.96, respectively [R. 402, 404-405]. It is submitted that appellant can not on the one hand contend, as he does (App. Op. Br. pp. 39, 58), that his business operation was sufficiently successful so that he did not need to defraud individuals for small amounts; and on the other hand maintain that he was financially unable to make refunds. Obviously, these positions are mutually inconsistent—for if appellant's business was successful he cannot plead lack of funds as his excuse for not making re-

funds; and if he lacked funds, the fraudulent obtaining of money, in small amounts at a time, from distantly located individuals was a means of getting the needed funds without great fear of retaliatory action. Furthermore, if appellant was in financial straits, as claimed, he knew that he could not make refunds all during the time that he was continually representing refunds would be made.

Having heard appellant's testimony and his explanations, the trial court, as trier of the facts, had the right to disbelieve his protestations of innocence in the light of the other evidence present in the record. In holding for appellee the trial court so acted, and it is submitted that there was substantial evidence in the record to sustain the Court's determination that appellant was guilty as charged beyond a reasonable doubt.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

Laughlin E. Waters,
United States Attorney,

Robert John Jensen,
Assistant U. S. Attorney,
Chief, Criminal Division,

Eugene N. Sherman,
Assistant U. S. Attorney,

Attorneys for Appellee, United States of America.

No. 16244.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Eric O. Sonntag,

Appellant,

vs.

United States of America,

Appellee.

APPELLANT'S REPLY BRIEF.

FILED

APR 27 1959

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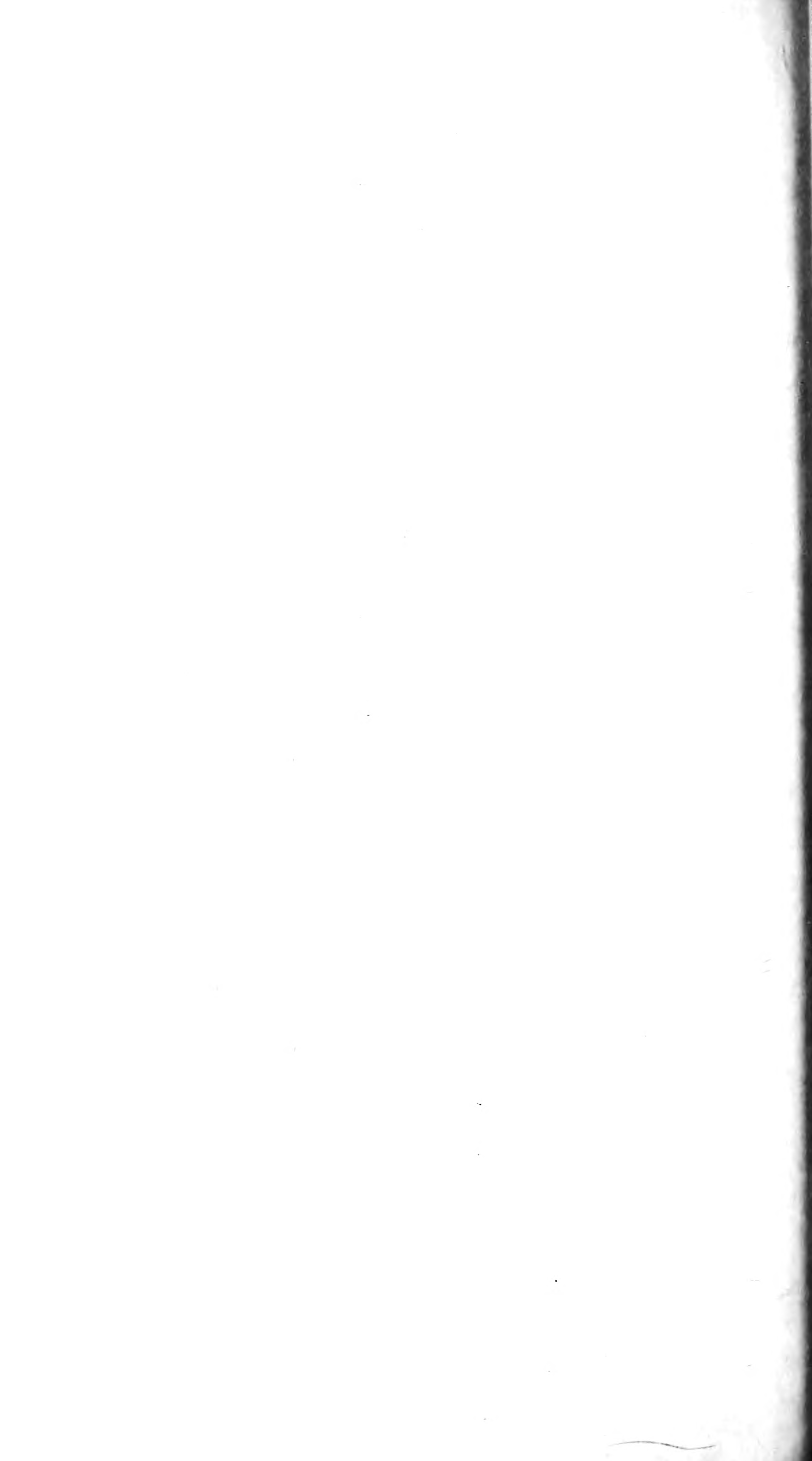

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No. 16244.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Eric O. Sonntag,

Appellant,

vs.

United States of America,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

Introduction.

This brief is submitted in reply to the brief of the government filed herein. In it appellant will undertake to bring to the attention of the court certain fallacies in the government's position.

II.

The District Court Erred in Denying Appellant's Motion Brought Under Rule 17(b), 18 U. S. C. A., to Subpoena Witnesses at the Government's Expense.

This point of appeal was initially raised and discussed by appellant in point II, pages 12 to 26, of his opening brief. Appellant at those pages urged that the trial court erred as a matter of law in concluding that appellant's affidavit was insufficient to satisfy the requirements of

Rule 17(b), Title 18, U. S. C. A. The government, at pages 9 through 13 of its brief, argues the point as though it involved the usual question of an abuse of discretion on conflicting facts. Thus it is stated at page 13 of appellee's brief:

> "In the case at bar the contents of appellant's affidavit were questioned by appellee's counter-affidavit and, in reviewing the evidence before it, as contained in said affidavits, the Court resolved the motion in appellee's favor. This the Court had the discretionary right to do."

The aforesaid statement is not only nonresponsive to appellant's argument but also is basically erroneous in the premise upon which appellee has chosen to found its argument. Appellant, therefore, while reiterating his basic original contention that the error was one of legal interpretation, requests the indulgence of this Honorable Court and asks that he be permitted to widen his ground of appeal to answer the government's argument that appellant's motion below was properly denied by the trial court in a valid exercise of its judicial discretion after considering conflicting evidence as presented by cross affidavits.

The government argues that the appellant's motion was adversely decided by the court after "reviewing the evidence before it, as contained in said affidavits" (Govt. Br. p. 13). The conflicting affidavits referred to by the government consist of two affidavits by appellant, one of which was set out in material part at pages 14 and 15 of appellant's opening brief, and a supplemental affidavit contained at pages 41 and 42 of the Clerk's Transcript[1] along with the affidavit of Eugene N. Sherman, the Assistant United States Attorney in charge of this case.

---

[1]This affidavit is contained in Appendix "A" of this brief.

An examination of the three affidavits compels the conclusion that there was, in fact, no conflicting evidence presented to the trial court but rather that the only admissible evidence of which the court could properly take cognizance was that contained in appellant's two affidavits. The affidavit of Mr. Sherman constituted the only attempt of the government to put evidence before the court on the question of whether or not appellant was an indigent; *ergo,* any evidence considered by the court in favor of the government's position must come from said affidavit, which reads as follows:

> "State of California, County of San Diego—ss.
>
> "Eugene N. Sherman, being duly sworn, deposes and says:
>
> "That he is an Assistant United States Attorney charged with the responsibility of representing the Government in the above entitled case.
>
> "That in connection therewith he caused an investigation to be made of the credit rating of the instant defendant. That Affiant has been informed and believes and therefore alleges that said investigation revealed that on February 6, 1957, the defendant submitted a report to Dun & Bradstreet which said report showed the following:
>
> "1. That the defendant averaged $40,000.00 per year gross volume;
>
> "2. That after withdrawals from the business by the owner he operated at the break even point;
>
> "3. That his business furnished the defendant with a fair living;
>
> "4. That his inventory was valued at $1,000.00 and the fixtures and equipment contained therein at $2,000.00;
>
> "5. That the building in which said business was located was owned by defendant jointly with his wife

and that said building was valued at $16,750.00, with an encumbrance of approximately $16,000.00;

"6. That the defendant's liabilities total $500.00 including overhead and accrued expenses;

"7. That the defendant owned a residence at 5310-12 South Normandie Avenue, Los Angeles, California, valued at $4,000.00 and encumbered in the amount of $7,800.00. with monthly payments in the amount of $150.00.

"Affiant further states that he has personally read the income tax returns of the defendant for the years 1954, 1955 and 1956; that said returns show that defendant grossed between approximately $25,000.00 to $40,000.00 during said years from said business.

"That Affiant is informed and believes and therefore alleges that as of February, 1957, defendant maintained a commercial account at a local Los Angeles bank with a balance running from high two to low three figures, and that defendant still maintains said account.

Eugene N. Sherman
Eugene N. Sherman"

It is to be noted that following a recital that Mr. Sherman is an Assistant United States Attorney charged with the responsibility of representing the government in this case (which appellant concedes) and that, as such, he caused an investigation to be made of appellant's credit rating (appellant has no information as to the accuracy of this statement but assumes it *arguendo*) Mr. Sherman's affidavit on page 39 of the Clerk's Transcript, lines 13 *et seq.*, alleges on *information and belief* that the investigation revealed that on February 7, 1957, appellant submitted a report to Dun and Bradstreet which contained divers information. There follows *still on information and belief* an enumeration of items the Dun and Brad-

street report allegedly contained. It is not until line 8 of page 40 of the Clerk's Transcript that Mr. Sherman alleged directly, of his own personal knowledge, that he had read appellant's income tax returns for the years 1954 through 1956 and that said returns showed a *gross* dollar volume of business conducted by appellant of between $25,000.00 and $40,000.00 per year. It is significant that, since Mr. Sherman admits that he had access to appellant's income tax returns, he did not set forth appellant's *net* profit rather than his *gross* income.) Having finally emerged from the murky atmosphere of information-belief allegations briefly, affiant promptly wtihdraws into the same obscurity alleging on information and belief on page 40, lines 13 *et seq.,* that as of February, 1957, appellant maintained a commercial account at a Los Angeles bank with a balance running from "high two to low three figures" and that appellant still maintained that account.

A verification upon information and belief is quite a different thing from either a direct allegation of a fact or an allegation of the truth of a fact to the best knowledge of the affiant.

> *State v. Whitaker* (1929), 34 N. M. 477, 284 Pac. 119.

The latter allegations are positive in their character, stemming as they do from the personal knowledge of the affiant; while the former allegation is, at best, mere hearsay and not competent evidence even in those cases where evidence may be supplied by affidavit. It is apparently well established that those portions of an affidavit which are made on information and belief are hearsay and of no evidentiary value. As stated in

> 22 Cor. Jur. 207:
>
> "* * * A statement otherwise objectionable as hearsay does not become competent because it has been reduced to writing."

In

2 C. J. S. 981,

it is stated:

> "* * * the averments must be direct and positive and not on information and belief * * * where the affidavit is required for use as evidence, such statements generally being merely hearsay and barred by the rules of evidence governing hearsay * * *"

The court in

Kellett v. Kellett (1934), 2 Cal. 2d 45, 39 P. 2d 45,

stated at page 48 of the California Report:

> "As evidence, an affidavit made upon information and belief is hearsay and no proof of the facts stated therein."

See also on this point:

Franklin v. Nat C. Goldstone Agency (1949), 33 Cal. 2d 628, 204 P. 2d 37;

Jeffers v. Screen Extras Guild, Inc. (1955), 134 Cal. App. 2d 622, 286 P. 2d 30;

Bank of America v. Williams (1948), 89 Cal. App. 2d 21, 200 P. 2d 151;

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Pelegrinelli v. McCloud River etc. Co. (1905), 1 Cal. App. 593, 82 Pac. 695.

The rationale for this rule is expressed in—

1 Cal. Jur. 672,

wherein it is stated:

> "But where one is testifying as to something that has transpired, he can ordinarily testify only as to those facts which he knows of his own knowledge,

> and it is immaterial whether, in this connection, his testimony be taken by affidavit, deposition or oral examination. So, affidavits to be used as evidence which are made upon information and belief are hearsay and afford no competent evidence of the facts alleged therein."

See also cases contained on this point in note 18, page 672, of the above work.

In the light of the foregoing, it is the contention of appellant that the only evidentially admissible portions of Mr. Sherman's affidavit which the court could properly have considered were (a) that Mr. Sherman was an Assistant United States Attorney, (b) that Mr. Sherman was charged with the conduct of the instant case for the government, and (c) that Mr. Sherman read appellant's tax returns for the years 1954 through 1956 and they showed appellant's gross income to be between $25,000.00 and $40,000.00 for those years. It is submitted that none of these positive allegations are relevant to the point in issue—appellant's indigency—(a) and (b) for obvious reasons, and (c) for the reason that a person's *gross* income is not indicative in any way of that person's *net* profit and current worth.

The fact that appellant grossed $40,000.00 a year is in no way inconsistent with appellant's allegation that he was an indigent. Assuming, however, *arguendo* that Mr. Sherman's affidavit was admissible evidence, it is submitted that it contains no evidence properly considered in a determination of appellant's financial status on June 5, 1958 (the date of both the motion and the affidavit). From the face of the affidavit it appears that the alleged report to Dun and Bradstreet was prepared on February 6, 1957, some 16 months prior to the date of appellant's motion. Much could happen in the 16-month interval; indeed, as it appears from both of appellants affidavits [Clk. Tr. pp.

19-23 and 41-42], appellant spent much of his money for the defense of his case and had encountered financial difficulties in the operation of his business. What appellant's financial condition may or may not have been 16 months prior to the time that he made a motion as an indigent defendant under Rule 17(b) has not the slightest relevancy to his financial condition at the time he claimed to be an indigent and made the motion.

Assuming further *arguendo* that the affidavit was evidentally admissible and that the information contained in the Dun and Bradstreet report had some relevance in time to appellant's financial condition on June 5, 1958, it is appellant's position herein that rather than contradicting appellant's assertion that he was on June 5, 1958, an indigent the affidavit fortifies such contention. Paragraph 1 states that appellant averaged $40,000.00 a year *gross;* but paragraph 2 reveals that, despite the above gross, appellant's business "operated at the break even point." Paragraph 3 states that appellant had "a fair living" from business; however, no attempt is made to define what a "fair living" is, or what annual income is necessary to sustain such a status. Attorney's fees and costs of litigation (including the $4,000.00 necessary to produce the witnesses in question) are relatively fixed and, in the case of a man doing a $40,000.00 a year gross in a high-overhead business such as the mail order sale of rare birds and animals difficult and expensive to procure, could prove quite staggering.

Paragraph 4 states that appellant's business contained a $1,000.00 inventory and two thousand dollars worth of equipment and fixtures. Even assuming that appellant by forced sale could realize these values from his inventory and fixtures, the total thus obtained would have been insufficient to produce the witnesses. In addition, it is appellant's contention that Rule 17(b) does not contemplate that in order to qualify as an indigent a defendant

must sell or liquidate his only means of livelihood. Paragraph 5 states that appellant and his wife jointly owned the building where the business was conducted. (The fact is appellant and his wife had had an equity of $750.00 in said building which had been foreclosed by June, 1958).

For the reasons heretofore set forth, appellant submits that such factors do not destroy his assertion of indigency. Paragraph 6 contains merely a statement that defendant's liabilities were $500.00. Such statement serves only to buttress the contention that he was an indigent. Paragraph 7 states that appellant owned a residence in Los Angeles which was valued at $4,000.00 and encumbered in the amount of $7,800.00. (Appellant had also had his interest in this building foreclosed by June, 1958.) In the next to last paragraph of the affidavit it is stated that the affiant had read appellant's income tax returns from 1954 through 1956 and that said returns showed that appellant grossed between $25,000.00 and $40,000.00 during said years. As heretofore pointed out, it is significant that with the income tax returns available to affiant affiant did not state appellant's net income during said years.

In the last paragraph of the affidavit, it is stated that appellant maintained a commercial account at a Los Angeles bank in which the balance ran from a "high two to low three figures." Appellant contends that the fact that a man might have between $75.00 and $125.00 in the bank does not disqualify him from classification as an indigent under Rule 17(b), U. S. C. A.

As heretofore argued at pages 19 through 23 of appellant's opening brief, it is not necessary for one to be a pauper to be an indigent.

> *Adkins v. E. I. Dupont de Nemours & Co.* (1948), 335 U. S. 331, 93 L. Ed. 43;
>
> *Goodall v. Brite* (1936), 11 Cal. App. 2d 540, 54 P. 2d 510;

Dupue v. District of Columbia, 45 App. D.C. 54;

In re Hybart, 119 N. C. 359, 25 S. E. 963;

Massachusetts Gen. Hospital v. Inhabitants of Belmont, 233 Mass. 190, 124 N. E. 21;

People v. Board of Supervisors, 121 N. Y. 345, 24 N. E. 830;

21 Words and Phrases 152, 153;

42 C. J. S. 1363.

Appellant could not pay the $4,000.00 necessary to produce the witnesses and still provide himself and his dependents with the necessities of life. He was an indigent within the meaning of Rule 17(b).

Under the foregoing authorities the purported counter affidavit filed by the government at the hearing on appellant's motion under Rule 17(b) was of no evidentiary effect and could not have properly been considered by the trial court in determining the motion. However, the government takes the position that the court did rely upon said affidavit in determining the motion, it being stated at page 10, footnote 7, of the government's brief that—

> "[7]In making its ruling the Court expressly referred to the information pertaining to appellant's financial condition which appellee had set forth in its counter-affidavit (A. 31-32)."

It is not, therefore, left to speculation whether the trial court was influenced by the government's affidavit, since the government expressly urges such to be the case. Where, as here, the ruling of the trial court was tinged by reliance upon an incompetent affidavit, error has been committed to the prejudice of the defendant and the case must, in the interest of justice, be reversed.

Appellant does not concede the validity of appellee's argument that no prejudice was worked upon him by the denial of his motion under Rule 17(b). This point is extensively covered at pages 24 and 25 of appellant's opening brief and will not be further pressed here. Suffice it to say that appellant was forced into stipulated testimony and cross-examination without being accorded a correlative right of cross-examination of the government's stipulation witnesses. The Honorable Judges of this Court being men of great trial experience either on the bench, at the bar, or both, do not require appellant to point out to them the disadvantage of relying on "paper testimony" in the place of testimony of "live witnesses." When it is considered that the government for the purpose of "trial tactics" brought witness Frankenfield [Tr. 158-180], a non-indictment witness, from Perkasie, Pennsylvania, to Los Angeles, to give maudlin testimony concerning the loss by her two young sons of some $5.00 earned by delivering papers and dishwashing, it ill becomes the government now to protest righteously against requiring the public to pay necessarily heavy costs on behalf of defendant (Govt. Br. p. 11, quoting *United States v. Kinzer,* 98 Fed. Supp. 6). The inequities are apparent. Error was committed in not permitting appellant the privilege of having the government pay for the production of his witnesses. Prejudice resulted from this failure, and the case should on this ground alone be reversed.

III.

The Conviction Must Be Reversed Because in the Light of the Evidence Taken as a Whole the Evidence Is More Consistent With Innocence Than With Guilty and the Conviction, Therefore, Clearly Erroneous.

This point was thoroughly discussed by appellant at pages 26 through 56 of his opening brief. The government in answering at pages 15 and 16 of its brief seeks to invoke the well known rule that appellate courts are not retriers of the facts. The government does not, however, answer or distinguish the rules set out in

United States v. United States Gypsum Co., 333 U. S. 364, 92 L. Ed. 746,

and other cases cited at page 27 of appellant's opening brief, which permit appellate review of the entire evidence of cases tried before a judge and futher permit reversal of the trial judge where his findings are clearly erroneous based upon such a review.

The instant case is a case within this rule, and appellant feels confident that this Honorable Court, upon a review of the evidence, will agree with his basic premise, viz., that a business is not operated as a scheme to defraud, absent direct evidence thereof, where 99 per cent of said business is satisfactorily conducted and only 1 per cent results in loss to customers. In so stating this premise, appellant is mindful of the line of cases represented by

Blanton v. United States (1914), 213 Fed. 320,

and

Barnes v. United States (1928), 25 F. 2d 61,

which hold that the fact that one portion of a business is legitimately operated is no defense to the fraudulent operation of another portion of that business.

These cases are distinguishable. In each of the cases supporting the aforesaid rule, there was some valid ground of distinction between the fraudulent and legitimate portions of the business other than the mere fact of loss to the customers in certain of the transactions. For instance, the *Barnes* case, *supra*, deals with the sale of worthless securities by mail. In the over-all scheme to unload worthless securities, *some* good securities were sold. The same thing occurred in *Blanton v. United States, supra,* in regard to soldier's script. However, in both of these cases and in the other cases in this line, the worthelessness or value of the respective securities was known to the defendants at the commencement of each individual transaction. Such facts do not apply in this case. Rather than the loss to the customers resulting from a fraudulent intent of appellant at the inception of each transaction, the loss here was caused by intervening circumstances. In each case at the outset appellant possessed no intent to defraud. He did not say to himself, for example: "I will defraud the customers in the Champlin and Frankenfield transactions, but I will legitimately carry out my commitments with Mr. Thompson."

In each case, appellant at the inception of the transaction intended either to supply the pets or return the money. It was the intervening cause of business reverses, lax business practices, or the peculiar nature of the mail order pet business which resulted in the losses which occurred in one per cent of his total business—not fraudulent intent. There is no showing that defendant filled orders for Mynah birds but ignored orders for monkeys and parakeets. Nowhere, despite the claims of the government to the contrary (Govt. Br., pp. 6 and 19) is there anything which would support the theory that appellant filled all local orders and ignored out-of-town orders. (It is of interest to note that the transactions relied upon to prove this unique theory involved only two "local" customers,

and they are local only in the sense that their businesses are located in Southern California—one in Oxnard, and one in Bakersfield [Tr. 322, 323, 394, 458, 459; Govt. Br. p. 6].) The most that can be said is that in one per cent of his business transactions (based on gross dollar volume) appellant neither returned the customer's money nor supplied him with the merchandise ordered. Such a situation is not to be commended and constitutes lax business practice; but, absent, as it is, a plan systematically to mulct the public, it does not constitute fraud.

The nature of appellant's business must again be considered in determining whether a fraudulent connotation can be logically drawn from the facts of this case. Pets, unlike inanimate merchandise, cannot be stocked by a small retailer in amounts sufficient to accommodate every conceivable demand. This especially is true where the sale of the pets is carried out on a nationwide scale by mail. Pets must be fed. Pets must be watered. They must be extensively cared for both when healthy and when ill from any of the myriad of strange diseases to which nonindigenous species are subject. Pets cannot be stacked row on row on a shelf or in a storeroom. Pets cannot be shipped in a routine manner but require special skill and care in packaging to insure their arrival alive and in good health. Pets, in short, are extremely consuming of the time, space, and money of one engaged in the pet business. Because of this, of crucial importance in the pet business is the computation of how many to keep on hand at any given time to satisfy anticipated demands. If one overestimates demand, the surplus stock can not be stored indefinitely without disaster. The over optimistic pet retailer can literally be eaten out of house and business. In addition, the maintenance of large numbers of pets in cramped quarters in the presence of other strange species subject to a variety of diseases is an invitation to wholesale depopulation of the stock through death. The pet dealer then labors under an un-

usually compelling necessity to anticipate exactly the short term demands likely to be made upon his stock. This is extremely difficult in the case of the retail pet dealer who draws his clientele from an ascertainable local area; but in the case of the nationwide wholesale mail order dealer the problem is almost overwhelming.

Unlike, for instance, Sears Roebuck, Montgomery Ward, or New Process, Inc., or other large mail order houses selling inanimate merchandise, it is impossible for a mail order pet dealer to predict just what the nationwide demand for any one species of animal will be in any given time quantum. Unlike sales of perfumes, toothpaste, etc., pets are not a staple item with a relatively uniform rate of consumption. The demand for pets, on the contrary, fluctuates widely as fads for certain species come and go and the individual desire for something arises. Accordingly, when appellant would receive one dozen parrots in stock and would initially advertise them for sale he would have no way of knowing then whether he would receive orders for one parrot or one hundred parrots in response to his advertisement. If the former, he would be stuck with eleven voracious delicate parrots; if the latter, he would be faced with the urgent necessity of unearthing eighty-eight additional birds.

This latter situation deserves further attention. With cognizance of the possibility of orders in excess of his stock on hand, appellant would, when orders exceeded supply, seek to obtain the pets from secondary sources such as other pet stores and dealers to fill his orders. It was, perhaps, here that appellant made his gravest business error. Since he was operating on an exceedingly slim profit margin, he would upon receipt of payment immediately deposit the money in his account while he was attempting to fill the order. In a great majority of cases this arrangement worked very well; but in cases representing

one per cent of his gross business he could neither fill the order nor at the end of the 45-day period did he have the cash to make a refund to the customer. It is this one per cent of the business which gives rise to the government's case. However, it should be borne in mind at all times that appellant never solicited orders he did not intend to fill. He at all times had the pets "in stock for immediate shipment" at the time he placed his advertising [Tr. 449]. The inherent difficulties of the business in which appellant was engaged caused the defaulcations by appellant. Appellant's defaulcations in one percent of the gross dollar volume of his business cannot in the premises be considered fraudulent unless the court is prepared to rule that any inability to fill orders or return money in the conduct of a mail order pet business is *per se* fraudulent. Such an interpretation would place an unsupportable burden on anyone in the mail order business and would be in direct conflict with the decided cases:

Evans v. United States (1894), 153 U. S. 584, 592, 38 L. Ed. 830, 833 (Appellant's Op. Br., p. 54);

Gold v. United States (C.C.A. 8th, 1929), 36 F. 2d 16 (Appellant's Op. Br., p. 56);

Corliss v. United States (C.C.A. 8th, 1925), 7 F. 2d 455;

Harrison v. United States (C.C.A. 6th, 1912), 200 Fed. 662, 671 (Appellant's Op. Br., p. 56).

Appellant is undoubtedly civily liable to those persons whose orders were not filled or money returned. He may possibly be culpable of lax business methods. However, appellant was, on the facts of this case, not criminally guilty of fraud and the judgment so convicting him must be reversed.

In concluding this point, appellant wishes to correct any erroneous impressions which may have arisen from certain

misstatements in the government's brief. On page 7 of the government's brief, counsel for the government quotes a letter written by appellant. It is unfortunate that the government would stoop to attempt to distort a layman's unfortunate attempt at humor into an admission of guilt. Appellant denies that the letter was ever so intended.

Appellant is familiar with the opinion of this Honorable Court in

> *Penosi v. United States* (9th Cir., 1953), 206 F. 2d 529,

cited and quoted at page 18 of the government's brief but submits that in that case the defendant's guilt of the narcotics offense charged was firmly established by the circumstantial evidence. This is not true in the instant case.

Penosi was arrested with marked government money and other evidence of the narcotic trade in his possession. He was arrested in conjunction with a codefendant who actually possessed the narcotics. In the instant case on much weaker circumstantial evidence the government attempts to establish a fraudulent *state of mind.* The circumstances so relied upon support with at least equal force the conclusion that the perils of the mail order pet business and not any fraudulent intent were the cause of the defalcations. Where, as in the instant case, the circumstances relied upon by the prosecution to make out a defendant's guilt are not only equally consistent with innocence but more consistent with innocence, the rule enunciated in the *Penosi* case lacks applicability.

At page 19 of its brief, the government chooses to characterize appellant's business as a "wide scale fraudulent mail order business." Considering the use of the term "wide scale," appellant concedes that he did a nationwide legitimate mail order business. However, if the government means by the term "wide scale" to describe the number of cases in which appellant defalcated, appellant wishes

again to remind the court that these abuses occurred in only one per cent of the gross dollar volume of his business. This, it is submitted, is a far cry from conducting a "wide scale fraudulent mail order business."

Again at page 19 of its brief, the government asserts without reference to or foundation in, the record that appellant knew at the time he placed his advertising that he would neither deliver the pets nor refund the money advanced. This statement is not true. As heretofore stated, appellant at all times had the pets in stock when he advertised them as being available [Tr. 449]. The government has not seen fit to contradict this testimony beyond the unsworn statement of government counsel, which, of course, is not evidence.

At page 20 of the government's brief, the government seeks to assign as appellant's major premise in explanation of the defalcations a cargo embargo instituted by Pan American Airways. While this embargo was, of course, one of the contributing factors to appellant's difficulties, it was not the principal one. The inherent nature of the mail order pet business itself was at the root of appellant's problems. In this connection it should be observed that the government's statement (at page 20 of its brief) that the embargo did not apply to cargo service is both a distortion and a half truth since the shipments of appellant which were affected by the embargo originated in South America. It is true that the embargo did not cover cargo planes, but there were no cargo planes originating in South America. All Pan American cargo from South America had to be carried, if at all, as cargo on passenger flights. Passenger flights were affected by the embargo [Tr. 352, 355, 357].

Finally, on pages 20 and 21 of the government's brief, it is alleged that appellant has taken an inconsistent position in urging simultaneously on one hand that his business is successful enough so that he did not have to defraud individuals of small amounts and, on the other hand, that

lack of funds prevented repaying his creditors. Appellant cannot see the alleged inconsistency. It can well be (and is here) that a person may not be making a pronounced financial success of his business yet still be too honest to set about to intentionally defraud coustomers for his personal gain. It is not reasonable to think that person intent on fraud would attempt to conduct his fraudulent scheme from the same location for ten years, working long hours seven days a week without a vacation, all for a total gain over ten years beside his living of less than $800.00. The picture is much more consistent with a poor but honest man struggling to establish a small business which would ultimately supply him and his family with the necessities of life.

The trial court erred in holding appellant guilty of fraud under the facts of this case.

Conclusion.

The trial court erred, as a matter of law, in holding insufficient appellant's affidavit in support of his motion under Rule 17(b), 18 U.S.C.A. The motion was not decided on the evidence presented by conflicting affidavits since the only allegations not made on information and belief in the government's affidavit were immaterial to the issue, it being well established that those portions of an affidavit which are alleged upon information and belief do not constitute evidence. The material points of the government's affidavit, even if admissible as nonviolative of the hearsay rule, were irrelevant in point of time to appellant's financial status at the time of the hearing on the Rule 17(b) motion since said points were based on a report made by appellant 16 months prior to the date of the motion. In any event, the facts contained in the government's affidavit, if admissbile and relevant, themselves established appellant as an indigent since they showed him to be the debt ridden operator of a business which was

just breaking even financially. One does not have to be a pauper to be an indigent, and appellant's financial position at the time of his motion under Rule 17(b) was such that he could not afford to use $4,000 for witnesses and still attempt to provide himself and his dependents with the necessities of life. For these reasons the trial judge erred in not granting appellant's motion under Rule 17(b), thus forcing appellant into a prejudicial stipulation with the government. The case should be reversed on this ground.

Furthermore, appellant defalcated in only one per cent of the gross dollar volume of his business over the period of the indictment. The total dollar value of the defalcation was somewhat under $800.00. Appellant's difficulties were occasioned by business reverses, cargo embargoes, lax business practices, limited capital, and the inherent nature of the mail order pet business.

In the premises, it is submitted that a defalcation of one per cent of the gross dollar volume of a business over a three year period does not constitute fraud and for this most basic reason the judgment of conviction must be reversed.

Respectfully submitted,

Thomas H. Ludlow, Jr.,

Attorney for Appellant.

APPENDIX "A"

Supplemental Affidavit of Eric O. Sonntag in Support of Motion Pursuant to Rule 17(b) Federal Rules of Criminal Procedure.

United States District Court for the Southern District of California, Central Division.

United States of America, Plaintiff, vs. Eric O. Sonntag, Defendant. (No. 26583 CD.)

State of California, County of San Diego—ss.

ERIC O. SONNTAG, being first duly sworn, deposes and says:

1. That he is the defendant in this case and makes this affidavit in his behalf pursuant to Rule 17(b) of the Federal Rules of Criminal Procedure in order to supplement the affidavit heretofore made by him in support of this motion.

2. That his attorney has advised him that in his opinion the cost subpoenaing the witnesses referred to in the affidavit heretofore submitted by him in support of this motion (Exhibit "A," Par. 7) might be as much as two thousand dollars.

3. That he does not have two thousand dollars at his disposal or the major part thereof.

4. That he believes that he cannot borrow this sum or any substantial part thereof.

5. That he has obligated himself to pay additional attorney's fees for the defense of this case and will be in the debt of his attorney for said fees as they accrue; that the charge made of him by his attorney for defense of this case was $500.00 as a retainer fee, which he has paid, and

$150.00 per day for each day of trial, which he has not paid; and that it has been estimated that this case will take ten days of trial time.

/s/ Eric O. Sonntag
Eric O. Sonntag

Subscribed and sworn to before me this 5th day of June, 1958.

John A. Childress,
Clerk, U. S. District Court,
Southern District of California,
By William W. Luddy, Deputy.
(Seal)

No. 16,247

IN THE

United States Court of Appeals

For the Ninth Circuit

United States of America,
Plaintiff,

vs.

237,500 Acres of Land, More or Less, in the Counties of Inyo and Kern, State of California, etc., et al.,
Defendants.

L. Mills Beam and Robert Thomas (Lode Claimants),
Appellants.

vs.

B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker and Gene Delaney (Placer Claimants),
Appellees.

Appeal from Judgment for Distribution of Funds Deposited as Just Compensation for Condemnation and Taking of Mining Claims, United States District Court, Southern District of California, Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLEES' BRIEF.

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FILED
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PAUL P. O'BRIEN, CLERK

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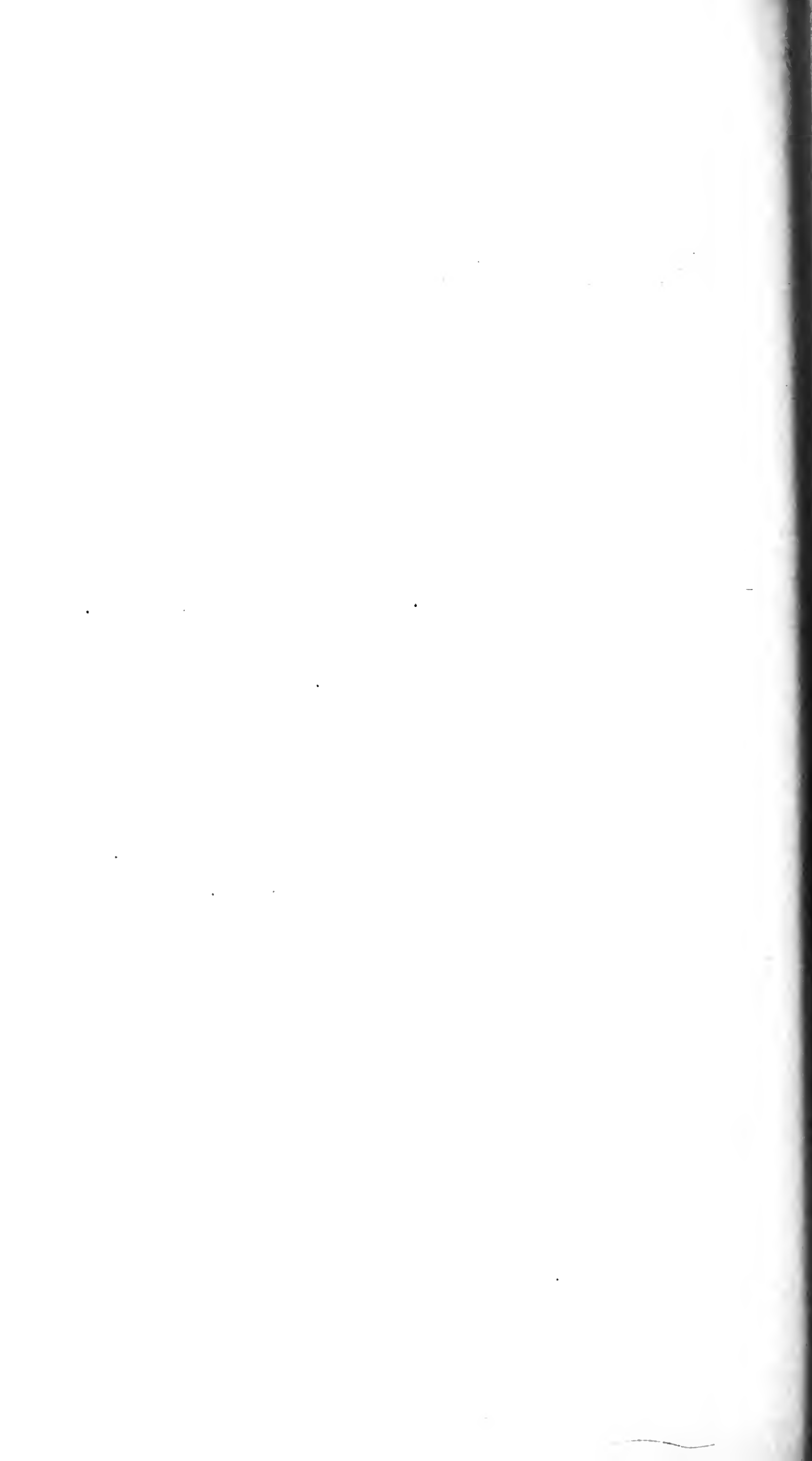

No. 16,247

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff,
vs.
237,500 ACRES OF LAND, MORE OR LESS, IN THE COUNTIES OF INYO AND KERN, STATE OF CALIFORNIA, etc., et al.,
Defendants.

L. MILLS BEAM and ROBERT THOMAS (Lode Claimants),
Appellants,
vs.
B. J. COMPTON, IRMA COMPTON, HAROLD OLSON, IRMA OLSON, W. H. MONTGOMERY, ROY HOOPER, R. B. WALKER and GENE DELANEY (Placer Claimants),
Appellees.

Appeal from Judgment for Distribution of Funds Deposited as Just Compensation for Condemnation and Taking of Mining Claims, United States District Court, Southern District of California, Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLEES' BRIEF.

STATEMENT OF THE CASE.

An order was made in the parent case fixing Monday, September 16, 1957, at 10 A.M., before the United States District Court, Southern District of California, Northern Division, in the court of the Honorable Gilbert H. Jertberg, sitting at Fresno, as the date of hearing to determine how and to whom distribution ought to be made of awards theretofore made for some eighteen separate parcels of land condemned and taken in the parent case, among which were included Parcels 549 and 552.

Appellant L. Mills Beam, representing appellant Robert Thomas through power of attorney, appeared claiming the award for Parcel 549 for the said Robert Thomas as locator of Morning Sun Lode mining claim on February 19, 1945. Appellees B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker and Gene Delaney appeared claiming the award for Parcel 549 by reason of placer locations Strate Line Pumice Nos. 4 and 5 made in May, 1940, and Strate Line Pumice Nos. 4 and 5 (Amended) made in October, 1940. Although the original location notices and the amended notices for the Strate Line Pumice claims were signed by J. B. Compton, Don Compton, Irma Compton, Leora Compton, Walter Buass, Marie Compton, R. E. Galloway and Shirley Compton, said placer claims were in the actual possession and ownership of the Appellees as copartners doing business as Strate Line Pumice Company and were claimed by them to be valid and existing on March 30, 1945, when the order of posses-

sion was granted to the United States with respect to the parcel.

Appellant L. Mills Beam appeared claiming the award for Parcel 552 as the locator of Thomas Lode mining claim on February 14, 1945. Appellees appeared claiming the award for Parcel 552 by virtue of the Strate Line Pumice placer claims, original and amended, mentioned in the previous paragraph, as copartners of Strate Line Pumice Company, and of which the Appellees were in possession and ownership and claimed by the Appellees to be valid and existing on March 30, 1945, when the order of possession was made by the Court in respect to that parcel.

The notice of hearing further notified those claiming the awards and sums on deposit in the registry of the court, that they "should be prepared to show what title or interest you had in the parcel or parcels hereinafter set forth, *at the time plaintiff's complaint in condemnation, or at the time its Declaration of Taking was filed in the subject action . . .*" (Emphasis added.)

All placer claimants appeared by Frederick E. Hoar, Esq., who now appears for the same Appellees. We emphasize this at the outset because Appellants erroneously assert on this appeal that only B. J. Compton appeared. This error no doubt stems from the fact that only B. J. Compton appeared and testified at the hearing in person. As the one of the placer claimants who did all of the "ground work" and was thoroughly acquainted with all phases involving the placer locations, the copartnership of the Appellees,

subsequent notices of election to hold during the period of moratoria and suspension of activities, it sufficed to amplify the documentary proof by his oral testimony.

It will be noted, however, that the proof of the Appellants was documentary only; L. Mills Beam, one of the Appellants, appeared personally in court, but he did not offer any testimony or other evidence to rebut the testimony of Mr. Compton, which fact is mentioned in the order of the court filed November 25, 1957, hereinafter copied into this brief.

Documentary evidence was submitted on September 16, 1957 and the case taken under advisement; it was re-opened and more thoroughly explored on October 7, 1957 and again submitted, permission being solicited and granted to Appellees to secure and file a certified copy of the amended location of Strate Line Pumice No. 5; and permission was granted Appellants to file a certificate of the County Clerk concerning lack of any articles of incorporation of Strate Line Pumice Co., Inc., in the Inyo County Clerk's office at Independence.

After Appellees in due course filed with the Court the certified copy of the amended location of Strate Line Pumice No. 5 Appellants' counsel by letter dated October 19, 1957 sought the Court's permission to file a "Certificate" of A. A. Brierly, a surveyor of Independence, California, to the effect that on October 19, 1957, he went upon the property described as Section 6, Township 22 South, Range 39

East, M.D.M. in Inyo County, had found the "original notice of location" for the Thomas lode claim, and that upon following the description shown in said notice, it was the "opinion" of the said surveyor that the Thomas Lode claim was located "partly in the *South* half of the Southwest Quarter of said Section Six and partly in the *South* half of the Southeast quarter of said section . . ." (emphasis added) and that the Morning Sun Mining Claim "was examined and found to be located in the *South* Half of the Southeast quarter of said Section Six" (emphasis added). The significance of the foregoing was that in "supplemental petition to allege more recently ascertained facts" and by Exhibit "C" which was made part of the petition "for evidence," L. Mills Beam had placed his Thomas Lode mining claim, Parcel 552, in the *North Half* of the South Half, and in his petition for the award of compensation for the Morning Sun Lode mining claim, filed by Beam representing Robert Thomas by power of attorney, by Exhibit "D" and "made part hereof for evidence herein of the locations of the Morning Sun Lode Claim with reference to the adjacent Thomas Lode claim (Parcel 552 of L. Mills Beam)," said L. Mills Beam had placed the said Morning Sun Lode mining claim, Parcel 549, also in the *North Half* of the South Half, abutting the Thomas Lode mining claim of L. Mills Beam. *In the North Half the lode claims were overlays of and overlapped the placer claims.*

Appellees promptly objected by letter of October 21, 1957, to this bald attempt to repudiate a position

tardily found to be untenable, and wrote to the trial judge as follows, in part:

> "However, we would respectfully object to the reception of the instrument at this late date as part of the proof of the adverse parties. The purpose of the instrument appears to be to contradict the proof already offered by Beam and Thomas as to the part of Section 6 in which the lode claims were located. We believe the instrument, offered for the purpose of impeaching the showing already before the Court on behalf of the claimants Beam and Thomas, is hardly the proper way of offering such proof. It further appears, on examination, that the location of the Beam and Thomas claims, on the ground, is opinion evidence only—Mr. Brierly's certificate states '. . . it is my opinion . . .' This is a poor method of impeaching the positive evidence over the signatures of the adverse parties, who may be assumed to know where their claims were located, as to that location. Lastly, there is afforded no right of cross examination.
>
> Permission to supplement the record by the filing of one certified copy of a pertinent instrument would not seem to warrant adverse counsel in submitting further argumentative evidence without right of cross examination. It is respectfully submitted the offer ought to be denied, both on technical grounds and substantive grounds."

On October 24, 1957, the Honorable Judge Jertberg wrote to Appellant's counsel, Mr. Dague as follows:

> "I have your letter of October 19th. In your letter you state that you are enclosing certificate of A. A. Brierly, Inyo County Surveyor, of the

> Thomas Lode and the Morning Sun Lode. The certificate refers to 'the original Notice of Location made by L. Mills Beam, February 11, 1945' and states that a copy is attached to the certificate. There is no such copy attached. Furthermore, the certificate states that there is attached a pencil sketch of said locations. No such sketch is attached.
>
> You request that the original Notice of Location as well as the sketch be received in evidence. There is no proper foundation for the receiving of such documents in evidence even if they had been attached to the certificate. I, therefore, will have to deny your request to receive such documents in evidence."

On November 25, 1957, the Court filed its "Order on the Distribution of Funds Deposited into the Registry of this Court." The order was in favor of the Appellees herein and was followed in due course by Findings of Fact, Conclusions of Law and Judgment.

Appellants' motions to vacate, set aside or modify the judgment, or to grant a new trial, were and each of them was denied by written order dated and filed April 30, 1958, and they now appeal. We would close this Statement of the Case with this observation: Appellees feel that certain portions of Appellants' brief wherein they attack the United States' attitude in the matter, falsely imputing to the United States Attorney, appearing by Mr. Albert N. Minton, Assistant U. S. Attorney, Southern District of California, bias favoring the Appellees, are not warranted

by the record and border on scandalous and impertinent matter. Mr. Minton took no part other than to "prepare and file the form of appropriate order for distribution of funds in accordance" with the Court's order of November 25, 1957, and his position was made clear by this brief statement:

> "Mr. Minton. If the Court please, I am entirely disinterested, an onlooker here in this controversy. I hold the money, and I am willing to give it to whomsoever the Court decides should have it." (Rep. Tr. p. 90, lines 8-11.)

This statement was made in response to the Court's query, "Do you have anything to say, Mr. Minton."

THE ISSUES INVOLVED.

Much confusion has been injected into this proceeding, which concerns only Parcels 549 and 552, by Appellants' reference to an award in the parent case for *Parcel 553*. Parcel 553 is in no wise involved, but since, through coincidence, the award for Strate Line *Leterbe* Pumice Placer mine or the *LET-ER-BE* mine, Parcel 553, was made to the same placer claimants who have been awarded compensation for the condemnation and taking of Parcels 549 and 552, which are the placer locations Strate Line Nos. 4 and 5 as originally made in May, 1940, and Strate Line Nos. 4 and 5 (Amended) made in October, 1940, the Appellants insist that Appellees have been fully compensated. It is much the same as saying that where Lot "X" and Lot "Y" are owned by the same indi-

vidual and that individual is paid for the condemnation and taking of Lot "X" he is automatically compensated for the taking of Lot "Y". Except for the pertinacity with which Appellants iterate and reiterate the fallacy, the assertion might have been passed without notice. Strate-Line *Let-er-Be* Pumice Placer, Parcel 553, for the condemnation and taking of which the same persons who are Appellees here had theretofore received compensation, was situated in the *North Half* of Section 6, Township 22 South, Range 39 East, M.D.B.M. Both the lode and placer claims comprising Parcels 549 and 552, involved in the present appeal, were in the *South Half* of the section, and both concededly in the *North Half* of that South Half, until the Appellants caught in the web of trespass and charged with overlaying the placer locations with lode locations, belatedly sought after the submission of the case by the Court-spurned certificate of A. A. Brierly, to shift the locality of the lode claims to the *South Half* of the South Half of Section 6.

By judgment entered October 11, 1956 in the parent case the Court had fixed the compensation and determined the absence of interest of certain parties, and wherein it was determined that Robert Thomas, one of the parties Appellants, and Appellees herein were the parties having an interest in *Parcel 549* (the Morning Sun Lode) *"as their interests may appear, and that no other person or persons has or have any interest or right to said parcel and shall take nothing,* and fixing the fair market value of said Parcel 549

on March 20, 1945, the date of filing the complaint, at $350.00. Similarly, by the aforesaid judgment, it was determined that L. Mills Beam, the other of the parties Appellant, (and Rheem Manufacturing Company and Great Lakes Carbon Company, the latter two making no appearance of any kind at the hearings of September 16 or October 7, 1957), and *Strate Line Pumice Company, Strate Line Pumice Company, Inc.* and the Appellees herein were the parties having an interest in *Parcel 552* (the Thomas Lode) *"as their interests may appear, and that no other person or persons has or have any interest or right to said parcel and shall take nothing."*

The fair market value of said Parcel 552 as of March 20, 1945, the date of filing the complaint for condemnation, was fixed at $2,500.00. The Court retained jurisdiction to disburse the funds.

From evidence in the case given on the summary hearing to determine to whom the money should go the Court found that the Appellees operated under the partnership name of Strate Line Pumice Company, and that these eight subsequently formed a corporation under the laws of the State of Nevada, known as the Strate Line Pumice Company, Incorporated; that this corporation was never authorized to do business in California, and "it is now and was at the time the order of possession was entered on March 30, 1945, an inoperative and defunct corporation." Thus it was that the claims of the partnership and the defunct corporation were identified as being identical with the claims of the Appellees, and vice versa.

It will therefore be seen that although the original and amended notices for the *Strate Line* Pumice claims Nos. 4 and 5, made respectively in May and October, 1940, were signed by B. J. Compton, Don Compton, Irma Compton, Leora Compton, Walter Buass, Marie Compton, R. E. Galloway and Shirley Compton, nevertheless, at the time the parent suit for condemnation, No. 311-ND Civil, was filed and at the time of the taking of the Parcels 549 and 552, ownership of the pumice claims was in the Appellees herein. Whether the ownership was by virtue of transfer of title from the actual locators, or whether the actual locators acted as agents or servants of the partnership, is not of consequence, and need not be explored, for the *fact* was, and so found by the Court in its judgment entered October 11, 1956 that the Appellants and Appellees named herein were the only persons entitled to the compensation awarded for Parcels 549 and 552, "as their interests may appear, and that no other person or persons has or have any interest or right to said parcels and shall take nothing."

Since all intendments are in favor of the summary judgment of the trial court disbursing the funds, it would seem the burden rested on the Appellants to show the absence of mesne conveyances vesting title in Appellees as of the time the government's suit in condemnation was filed, or the claims taken. The trial court further determined that the notices filed during the moratoria and period of suspension were filed by the Appellees herein as "the placer claimants."

The issues involved, then, were not complicated. The placer claimants, Appellees herein, claimed the awards of just compensation made with respect to both Parcels 549 and 552 on the ground that the placer claims were owned by them and valid and existing on March 30, 1945, when the order of possession was granted to the United States with respect to both parcels, and that the lode claimants were trespassers on the placer claims at the time the lode claims were filed and that there were no lodes or veins discovered or existing at the time such lode claims were filed. Appellees further asserted the lode locations were "overlays" of valid placer locations. B. J. Compton, one of the Appellees, supplemented Appellees' documentary evidence by oral proof.

Appellants asserted the validity of their lode locations and at the hearing relied on documentary proof. Robert Thomas, one of the Appellants, appeared by L. Mills Beam acting under power of attorney from Mr. Thomas, and did not come personally into court or give testimony. Mr. Beam, the other Appellant, was present in court but did not offer any testimony or other evidence to rebut the testimony of Mr. Compton, which fact the Court noted. After submission of the matter, Appellants sought to introduce the certificate of A. A. Brierly, which as hereinbefore shown, was not permitted by the Court. Then, on motion for new trial or to vacate, set aside or modify the judgment, and based entirely upon the contents of letters written from the Sacramento Land Office of the Bureau of Land Management of the United

States Department of the Interior to Mr. Samuel M. Dague, Appellants' counsel, one dated November 19, 1957, and one dated December 10, 1957, appended as Exhibits "B" and "C" to Appellants' Opening Brief herein, which adverse counsel is pleased to call "Land Office Decision," Appellants assert that any interest of the Appellees herein and to Strate Line Pumice Nos. 4 and 5 as originally located in May, 1940 and the subjects of Amended Locations in October, 1940, were declared invalid by decision of the Commissioner of the General Land Office dated June 26, 1946. It is the contention of Appellees that any decision of the Commissioner, even if made, did not affect the status of the Appellees as copartners of Strate Line Pumice Company, placer claimants to the awards herein.

ARGUMENT.

Appellees find it difficult to follow the argument of Appellants, or to answer all of the matters suggested in the opening brief, by reason of lack of cohesion, continual reference to the award for Parcel 553 not involved herein, and references to matters outside of the record. We shall be satisfied to present our argument under two headings:

I. The Order for the Distribution of Funds Deposited in the Registry of the Court to Appellees Herein Was Proper.

II. Any Decision of the Commissioner of the General Land Office Did Not Affect the Status

of the Appellees as Copartners of Strate Line Pumice Company.

I. THE ORDER FOR THE DISTRIBUTION OF FUNDS DEPOSITED IN THE REGISTRY OF THE COURT TO APPELLEES HEREIN WAS PROPER.

On this point we adopt as our argument the facts and the law as set forth in the Order of the Honorable Gilbert H. Jertberg, filed in the case, as follows:

Order of the Distribution of Funds Deposited Into the Registry of This Court.

"On the 20th day of March, 1945, plaintiff filed herein its complaint in condemnation describing the following parcels of land, to wit: Parcel 549 (Morning Sun Lode), and Parcel 552 (Thomas Lode), and on March 30, 1945, an order was entered granting the plaintiff immediate possession of the parcels.

On October 11, 1956, the Court made and entered herein findings of fact, conclusions of law, judgment and decree, which were docketed on October 15, 1956, fixing compensation and determining the absence of interest of certain parties herein and whereby it was found and determined by the Court:

(1) That the defendants having an interest in Parcel 549 (Morning Sun Lode) are Robert Thomas, Robert M. Thomas, B. J. Compton, Irma Compton, Harold Olson, Irma Olson, Harold Olsen, Irma Olsen, W. H. Montgomery, Roy Hooper, R. B. Walker, and Gene Delaney, *as their interests may appear,* and that no other person

or persons has or have any interest or right to said parcel and shall take nothing;

(2) That the defendants having an interest in Parcel 552 (Thomas Lode) are L. Mills Beam, L. Miles Beam, Rheem Manufacturing Company, Great Lakes Carbon Company, Strate Line Pumice Company, Strate Line Pumice Company, Inc., B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker, Gene Delaney, Harold Olsen, Irma Olsen and Miles Beam, *as their interests may appear,* and that no other person or persons has or have any interest or right to said parcel and shall take nothing;

(3) That the fair market value of said parcels was on March 20, 1945, as follows:

Parcel 549 (Morning Sun Lode)	$350.00
Parcel 552 (Thomas Lode)	$2,500.00

(4) The right to just compensation for Parcel 549 (Morning Sun Lode), and Parcel 552 (Thomas Lode) passed to and became vested in the following amounts respectively:

Parcel 549 (Morning Sun Lode)

Robert Thomas
Robert M. Thomas
B. J. Compton
Irma Compton
Harold Olson
Irma Olson
Harold Olsen
Irma Olsen
W. H. Montgomery
Roy Hooper
R. B. Walker
Gene Delaney $350.00

Parcel 552 (Thomas Lode)
L. Mills Beam
L. Miles Beam
Rheem Manufacturing Company
Great Lakes Carbon Company
Strate Line Pumice Company
Strate Line Pumice Company, Inc.
B. J. Compton
Irma Compton
Harold Olson
Irma Olson
Harold Olsen
Irma Olsen
W. H. Montgomery
Roy Hooper
R. B. Walker
Gene Delaney
Miles Beam $2,500.00

for which defendants the Court awards said sums set opposite the parcel number to the defendants having interests in said parcels, *as their interests may appear,* together with interest thereon at the rate of 6 per cent per annum from the 30th day of March, 1945, to and including the date upon which the plaintiff shall deposit said sums into the registry of the Court;

(5) That no other persons are entitled to any compensation for the taking of said parcels and shall take nothing;

(6) That the following defendants are granted judgment, respectively, against the United States of America in the following sums, together with interest at the rate of 6 per cent from the 30th day of March, 1945, to and including the date of the deposit of said funds in the registry of the Court:

Parcel 549 (Morning Sun Lode)

Robert Thomas
Robert M. Thomas
B. J. Compton
Irma Compton
Harold Olson
Irma Olson
Harold Olsen
Irma Olsen
W. H. Montgomery
Roy Hooper
R. B. Walker
Gene Delaney $350.00

Parcel 552 (Thomas Lode)

L. Mills Beam
L. Miles Beam
Rheem Manufacturing Company
Great Lakes Carbon Company
Strate Line Pumice Company
Strate Line Pumice Company, Inc.
B. J. Compton
Irma Compton
Harold Olson
Irma Olson
Harold Olsen
Irma Olsen
W. H. Montgomery
Roy Hooper
R. B. Walker
Gene Delaney
Mills Beam $2,500.00

for which defendants may have judgment *as their interests may appear.*

(7) That the Court retain jurisdiction to make and enter such further orders and judgment

as may be necessary and proper in the premises. (Italics added.)

On the second day of August, 1957, this Court made an order fixing Monday, the 16th day of September, 1957, as the date for a hearing to determine how and to whom distribution of the award heretofore made for the above described parcels of land should be distributed, and notifying the persons above named to appear and show what interest, if any, they have in the just compensation awarded by this Court for the taking of said parcels.

Service of the Order to Show Cause and notice of hearing was made by United States mail on all persons and corporations above mentioned. The hearing above mentioned came on before the Court on September 16, 1957. The plaintiff was represented by Laughlin E. Waters, United States Attorney, Albert N. Minton, Assistant United States Attorney appearing. The defendants, B. J. Compton, Irma Compton, Harold Olson, Irma Olson, Harold Olsen, Irma Olsen, W. H. Montgomery, Roy Hooper, R. B. Walker, Gene Delaney, Strate Line Pumice Company, and Strate Line Pumice Company, Inc., were represented by Frederick Hoar. The defendants, Robert Thomas, also known as Robert M. Thomas, and L. Mills Beam, also known as Mills Beam, L. Miles Beam and Miles Beam, were represented by Samuel McK. Dague. No appearance of any kind was made on behalf of the Rheem Manufacturing Company or the Great Lakes Carbon Company.

The matter was partially heard on September 16, 1957, and was regularly continued for further

hearing until the 7th day of October, 1957. At said hearing oral and documentary evidence was offered and received on behalf of the claimants appearing. Following said hearing, legal memoranda were submitted on behalf of the claimants appearing, and the matter was submitted to the Court for its decision.

It appears from the evidence that in May, 1940, two placer mining claims were located on the parcels in question by B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, R. B. Walker, Roy Hooper and Gene Delaney, who operated under the partnership name of Strate Line Pumice Company. These eight subsequently formed a corporation under the laws of the State of Nevada, known as the Strate Line Pumice Company, Incorporated. This corporation was never authorized to do business in California, and it is now and was at the time the order of possession was entered on March 30, 1945, an inoperative and defunct corporation.

The evidence discloses that on February 11, 1945, L. Mills Beam, also known as L. Miles Beam and Miles Beam, filed a notice of location of a lode mining claim on Parcel 552, and on February 16, 1945, Robert Thomas, also known as Robert M. Thomas, filed a notice of location of a lode mining claim on Parcel 549.

One of the placer claims, known as Placer Claim No. 4, was located on the same land on which Parcel 552, and a part of Parcel 549 were located, and the other placer claim known as Placer Claim No. 5, was located on the same land on which the remainder of Parcel 549 was located.

The defendant L. Mills Beam, also known as Miles Beam and L. Miles Beam, claims the award of just compensation made with respect to Parcel 552, and Robert Thomas, also known as Robert M. Thomas, claims the award of just compensation made with respect to Parcel 549, on the ground that the placer claimants had allowed their claims to lapse during the years of the Second World War, when the requirement of annual assessment work was suspended under what were known as 'moratoria statutes'. (Title 30 U.S.C.A. section 28a.)

The placer claimants claim the awards of just compensation made with respect to both parcels on the ground that their placer claims were valid and existing on March 30, 1945, when the order of possession was granted to the United States with respect to both parcels, and that the lode claimants were trespassers on the placer claims at the time the lode claims were filed, and that there were no lodes or veins discovered or existing at the time such lode claims were filed.

Section 28 of Title 30 U.S.C.A. provides that the locator of a mining claim, in addition to other requirements, must perform not less than $100 worth of labor or that improvements in that amount must be made on the claims each year. Failure to comply with the requirement of the 'assessment work' forfeits the claim of the locator. On May 7, 1942, a statute was enacted which amended the provisions of Section 28, by providing that the requirement of annual assessment work would be suspended from July 1, 1941 to the end of hostilities, which was December 31, 1946, and in order for a locator to hold a claim,

he was required to file a notice that he wished to hold it, before noon of July 1st of each year.

The placer claimants filed the following notices during the period of the suspension:

1. June 29, 1942, for the period July 1, 1941 to July 1, 1943.

2. March 7, 1944, for a period of a year. The notice was undated, but the notary certificate and the recording date show that it was intended for the year July 1, 1943 to July 1, 1944.

3. Notice filed July 11, 1945, for the year ending July 1, 1945.

The lode claimants contend that the notices were defective, and that therefore the land was open for location in February of 1945 when the lode locations were filed, and that the placer claimants had forfeited their claims by failure to file their notices as required by the statute.

The first notice is not seriously questioned, except that it is noted that the notice covers a two-year period, whereas it is contended the notices were to be filed annually. The answer to that objection is found in the statute itself which provided for a suspension of the annual assessment requirement from July 1, 1941 to July 1, 1943. (Act of May 7, 1942, 56 Stat. 271.)

The second notice is challenged because it was undated. The notices were filed on a printed form, which contained only a partial date to be completed by the claimant. The notice as it was filed read: 'For the year 194......'. However, the notary certificate shows clearly that it was signed

on March 7, 1944, and recorded on that date, and it is sufficient to establish that the placer claimants intended to hold their claims for the year ending July 1, 1944. (Scoggin v. Miller, 189 Pac. 2d 677, Wyoming; Pine Grove Nevada Gold Mining Company v. Freeman, 171 Pac. 2d 366, Nevada; Donoghue v. Tonopah Oriental Mining Company, 198 Pac. 553.)

In the Donoghue v. Tonopah Oriental Mining Company case the Court said that a failure to comply literally with the provision suspending the assessment work was not an intention to abandon the claim, and that there had been an open and honest effort shown to comply and no fraud or deceit was involved, and that the notice was sufficient to hold the claim in that case. The Court noted in the opinion that in cases decided by the Land Department it had been so held where no notice of intention to hold the claim had ever been filed.

The notice filed March 7, 1944, was sufficient notice to the public that the locators of the placer claims intended to hold them for the year ending July 1, 1944.

The notices filed were sufficient to comply with the requirements of the moratoria statutes down to the critical year ending July 1, 1945. There is no question but that the placer claimants could file the notice for 1945 at any time prior to July 1, 1945 and that their interest in the claims would be valid until that date.

The complaint in condemnation filed March 20, 1945, and the order of possession filed March 30, 1945, gave exclusive possession of the land to the government as of March 30, 1945. On the date

on which the lode claims were filed, the land was subject to the valid claims of the placer claimants.

It is true that the notice to hold the claims for the year ending July 1, 1945, was not filed until July 11, 1945. However, when these lode claims were filed, the placer claims were valid, and the lode locators were trespassers. The evidence is clear that no permission was sought by the lode locators to go upon the placer claims to prospect for lode, and that no permission was ever granted by the placer claimants to the lode claimants. No valid mining claim can be initiated by the commission of a trespass, and any attempt to so locate a lode claim upon the property claimed by placer locators without the latter's permission is a trespass. (Clipper Mining Company v. Eli Mining Company, 194 U.S. 220.)

There can be no forfeiture for nonperformance of the assessment requirement until the time has expired in which it may be performed. (Jones v. Peck, 63 Cal. App. 397.)

For the reasons hereinabove enumerated, the lode claimants never did have a valid claim, because they had never asked for nor received permission to enter the land occupied by the placer claimants.

Aside from the fact that the lode claims were initiated by a trespass and are thereby void, there was no evidence whatever that the land in question had any lode in place. The statute provides that no location of a lode mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. (Title 30 U.S.C.A. section 23.) Section 185.12 of Title 43 of the Code of Federal Regulations provides:

'No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or lode really exists.'

Section 185.12 of Title 43 of the Code of Federal Regulations provides:

'The claimant should, therefore, prior to locating his claim unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface.'

Section 37 of Title 30, U.S.C.A. provides:

'* * * where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.'

The placer claimants in the instant case not only testified that they did not know of any lode or vein on their placer claims, but they contend that none ever existed. Under the statute, the placer claimants would have the right to any lode which might subsequently have been discovered, if they did not know of its presence at the time of their placer locations.

The burden of proof is on subsequent locators to prove that the claim had been forfeited for

some failure to conform to the law. (Dennis v. Barnett, 30 Cal. App. 2d 145.)

The only testimony given at the hearing of this case on the subject of a lode in place was that of Mr. Compton who testified that no such lode or vein was present, and that the character of the soil formation was such that no lode or vein would normally be found in that area. Although one of the lode claimants, Mr. Beam, was present in court at the time, he did not offer any testimony or other evidence to rebut the testimony of Mr. Compton.

Under the order of this Court, entered October 15, 1956, jurisdiction was retained to make and enter such further orders and judgment as may be necessary and proper in the premises.

Under the evidence received in this case, and under the applicable principles of law, I find:

1. That B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker, and Gene Delaney are entitled to distribution of the award of just compensation made on October 11, 1956 for Parcel 549, in accordance with the decree and judgment made on October 11, 1956, and that Robert Thomas, also known as Robert M. Thomas, Rheem Manufacturing Company, Great Lakes Carbon Company and Strate Line Pumice Company, Inc., have and none of them has any interest or right to said just compensation, and are not entitled to the distribution of any part thereof.

2. That B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker, and Gene Delaney are entitled to distribution of the award of just

compensation made on October 11, 1956, for Parcel 552, in accordance with the decree and judgment made on October 11, 1956, and that L. Mills Beam, also known as L. Miles Beam, and Miles Beam, Rheem Manufacturing Company, Great Lakes Carbon Company, Strate Line Pumice Company, Inc., have and none of them has any interest or right to said just compensation, and are not entitled to the distribution of any part thereof.

Counsel for the plaintiff is hereby directed to prepare and file form of appropriate order for distribution of funds in accordance herewith.

The Clerk of this Court is directed to forthwith mail copies of this order to counsel for the parties.

Dated, November 25, 1957.

Gilbert H. Jertberg,
Judge, United States District Court."

II. ANY DECISION OF THE COMMISSIONER OF THE GENERAL LAND OFFICE DID NOT AFFECT THE STATUS OF THE APPELLEES AS COPARTNERS OF STRATE LINE PUMICE COMPANY.

The only showing of the existence of any action by the Commissioner, General Land Office, to invalidate the placer claims Strate Line Pumice Nos. 4 and 5, as originally located, and the subjects of amended locations in October, 1940, is that contained in the letters appended as Appendix "B" and "C" to the Appellants' opening brief. Personally, Appellees' counsel has not been able to find any such decision by the

inspection of the reported Decisions of the U. S. Department of Interior in the volume wherein a decision dated June 26, 1946 would ordinarily appear; and it seems the least Appellants should have done would have been to produce a certified copy of any such Decision. The letter from the Bureau of Land Management, itself, is clearly hearsay; and the contents of the letters are in no wise a refutation of the actual ownership of the claims by Appellees herein as copartners of Strate Line Pumice Company as "transferees" from the actual named locators of the placer claims who are identified in the Bureau's letter as being J. B. Compton, Don Compton, Irma Compton, Leora Compton, Walter Buass, Marie Compton, R. E. Galloway and Shirley Compton, who, except for J. B. Compton and Irma Compton, *are different persons* from the Appellees herein. It is certainly unplain how any declaration of forfeiture against these differently named persons would bind the Appellees herein. It is further shown in the Order for distribution heretofore copied into this brief in argument of Point I that the *Appellees herein, not* those who were the actual named locators of Strate Line Pumice Nos. 4 and 5 above named, were the ones who filed the notices of June 29, 1942, March 7, 1944 and July 11, 1945, during the period of suspension and moratoria. With these notices of record disclosing the interest of the Appellees herein, it is difficult to perceive how any Departmental action initiated to declare a forfeiture of the claims or invalidation of locations could affect Appellees as copartners of Strate Line Pumice

Company, without making them parties to the proceeding. Finally it does not appear that J. B. Compton and Irma Compton in their association with the other named locators of the Strate Line claims are named in their capacity as copartners of the other Appellees herein in the Strate Line Pumice Company. Because one may be an associate of "A" it does not follow that the same individual may not be a copartner of "B".

And on Appellants' assertion that the favorable result to Appellants in sustaining their answer to the proceedings instituted by the government to establish the land embraced within the two lode claims to be "nonmineral in character and that minerals had not been found within the limits of the claims to constitute a valid discovery," as indicated in the letter appended to the Opening Brief as Exhibit "C", became *res judicata* of their right to receive the awards of compensation herein as against the Appellees herein, it is submitted the position is not tenable. If such a proceeding were had, it was not an adversary proceeding between the Appellants and Appellees as private parties before the Bureau of Land Management, and could in no wise determine conclusively as between the Appellants and Appellees whether there was a "trespass" committed, or an overlapping or overlaying of valid placer locations in the possession of Appellees.

CONCLUSION.

It is respectfully submitted that the award and distribution to Appellees of the funds deposited into the registry of the court as just compensation for the condemnation and taking of Parcels 549 and 552 was just and proper and that the judgment of the lower court should be sustained.

Dated, Bakersfield, California,
November 3, 1959.

FREDERICK E. HOAR,
Attorney for Appellees
(Placer Claimants).

No. 16248

United States Court of Appeals

for the Ninth Circuit

FRANK D. BETTENCOURT, JOE R. JACINTO and VIOLET JACINTO,

Appellants.

vs.

BERTHA WATTS SHOTWELL,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division.

FILED

JAN 29 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—1-23-59

No. 16248

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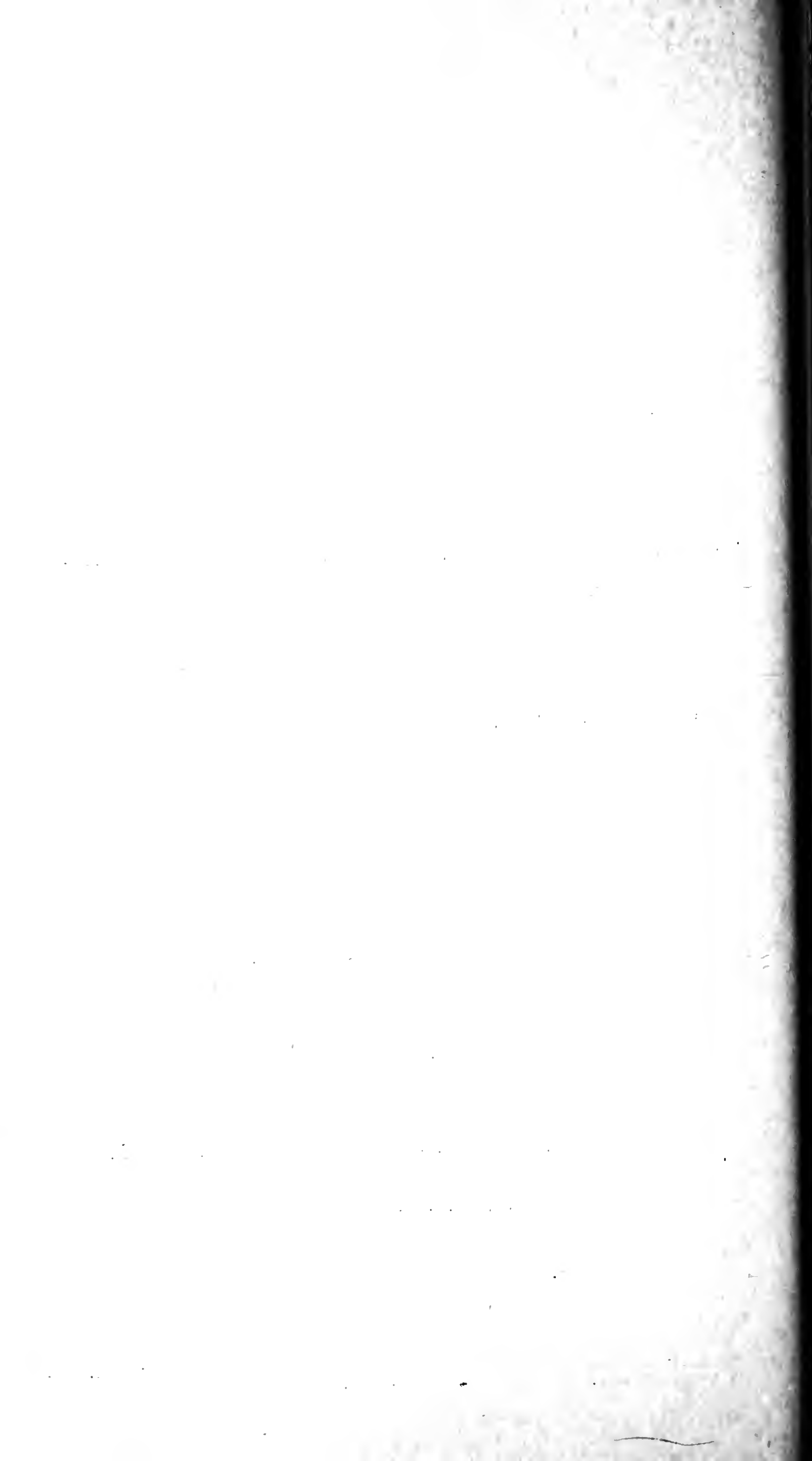

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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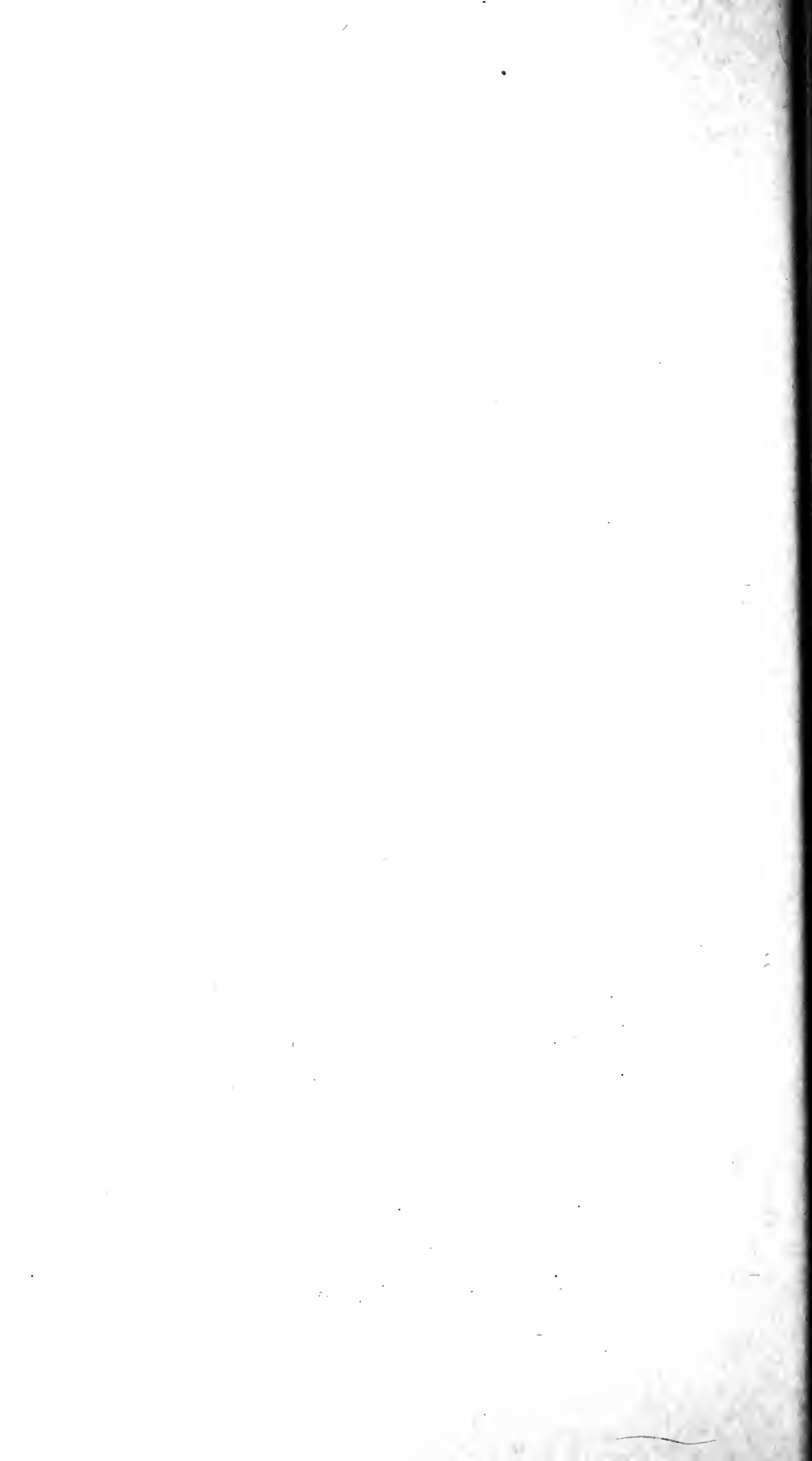


United States District Court for the Northern District of California, Northern Division

No. 16966

In the Matter of:

WILLIAM W. DUNCAN AND SON

PROOF OF CLAIM BY INDIVIDUAL

State of California,
County of San Joaquin—ss.

Bertha Watts Shotwell of Route 1, Box 285, Manteca, California, County of San Joaquin, State of California, being duly sworn, deposes and says:

I.

That William W. Duncan and Son, the above-named parties were at, and before the filing of them of the Petition for relief under Chapter 11 of the Bankruptcy Act, and still are, justly and truly indebted to the said deponent in the sum of Ten Thousand Dollars ($10,000.00).

II.

That the consideration of said debt is as follows: A loan made to William W. Duncan and Son in Manteca, California, on May 17, 1955.

III.

That there are no offsets or claims to said debt except ....

IV.

That deponent does not hold, and has not, nor has any person by her order, or to her knowledge or belief, for her use, had or received any security or securities for said debt.

V.

That said check is attached hereto and marked "Exhibit A" and made a part hereof.

VI.

That said debt is now due and owing and unpaid.

/s/ BERTHA WATTS SHOTWELL.

Subscribed and sworn to before me this 29th day of January, 1958.

[Seal] /s/ NELS B. FRANSEN,

Notary Public in and for the County of San Joaquin, State of California.

Exhibit A

MANTECA BRANCH

Bank of America

NATIONAL TRUST AND SAVINGS ASSOCIATION

No.______

90-712
1211

MANTECA, CALIF. May 17 1955

PAY TO THE ORDER OF Mrs Wm Duncan $10,000 00/xx

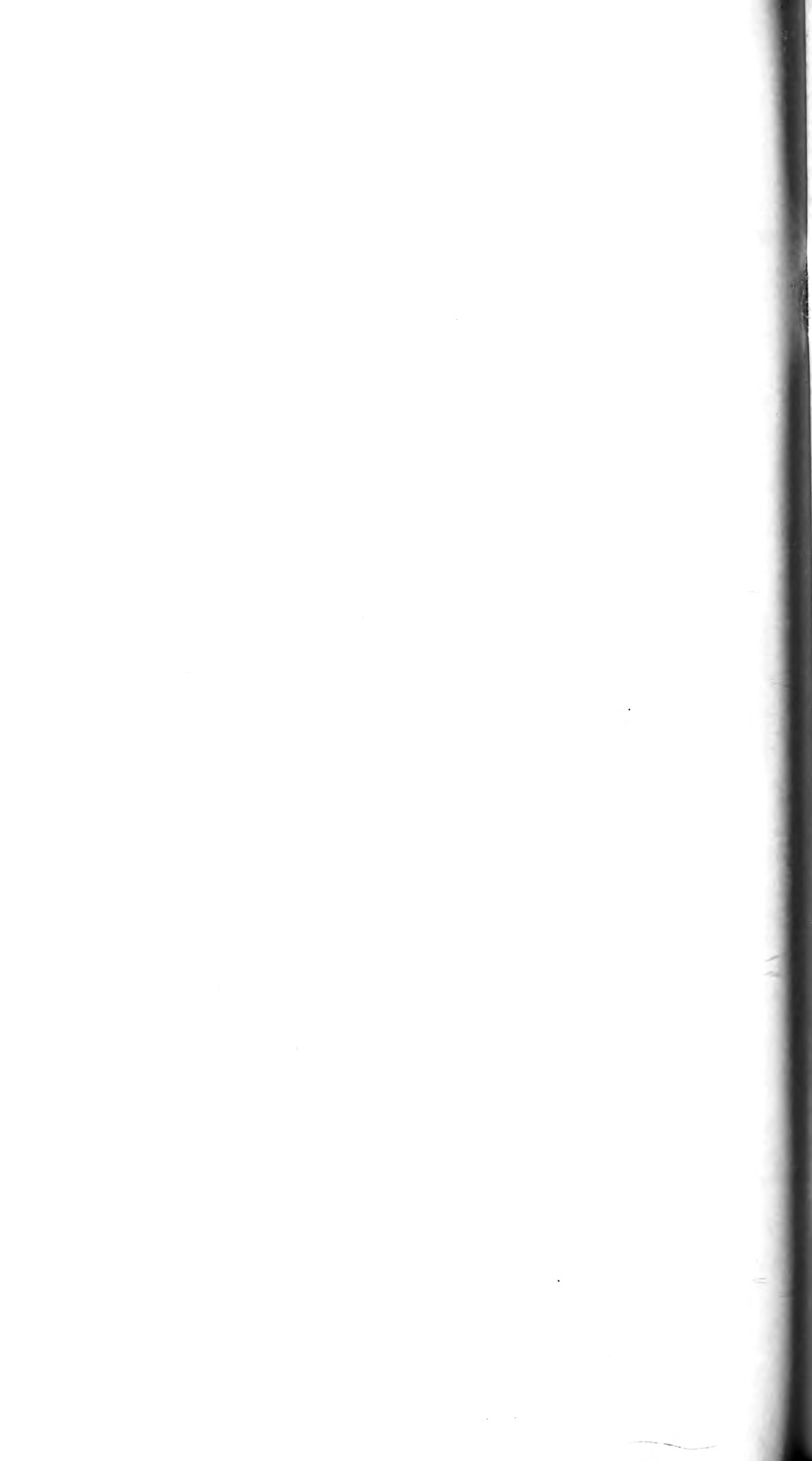
Ten thousand only DOLLARS

Bertha May Shortsell

Mrs
Wm Duncan
Deposit
Wm Duncan & Sons
Dairy

PAID 5 17 55

Endorsed: Filed February 7, 1958.



[Title of District Court and Cause.]

OBJECTION TO CLAIM OF BERTHA WATTS SHOTWELL

Comes now Frank D. Bettencourt and respectfully states and represents as follows:

(1) That he is a creditor of the above-named debtors, having heretofore, and on or about September 15, 1957, filed herein his claim against said debtor in the amount of $14,194.87, together with interest thereon at six per cent (6%) per annum from July 1, 1957, for money theretofore loaned by claimant to said bankrupts; that said claim was subsequent to the filing thereof proved and allowed and is now an existing proved and allowed claim against said debtor in the amounts aforesaid.

(2) That he has heretofore made oral demand upon the attorney for debtors to file objections to the claim of Bertha Watts Shotwell, Route 1, Box 285, Manteca, California, more specifically hereinafter described and mentioned and that the attorney for said debtors has refused to file any such objections.

(3) That on or about January 30, 1958, one Bertha Watts Shotwell, Route 1, Box 285, Manteca, California, did file herein her claim in the sum of $10,000.00, allegedly for a loan made to William Duncan & Son, Manteca, California, on May 17, 1955; that so far as can be ascertained, said claim has not yet been approved and allowed as a claim

against the above-entitled bankrupt and is pending herein, subject to any valid objections thereto that may be made.

(4) That said claim of Bertha Watts Shotwell filed herein as above specifically set forth and described is objectionable and is not subject to allowance herein for the following reasons:

(A) That said claim is barred by the provisions of Section 339 of the Code of Civil Procedure of the State of California, in that it is a claim upon a contract, obligation or liability not founded upon an instrument in writing made more than two (2) years after the date when cause of action first accrued in favor of claimant and against the above-named debtor on said claim.

(B) That claim, if any claimant has, is against one Mrs. William Duncan and not against the debtor above named, William Duncan & Son.

(C) That the moneys advanced or claimed to be advanced by claimant were advanced and paid to Mrs. William Duncan and not to debtor above named, William Duncan & Son and were used for the benefit of said Mrs. William Duncan and not for the benefit of debtor above named, William Duncan & Son.

Wherefore, said Frank D. Bettencourt prays that time and place of hearing on this objection to the claim of Bertha Watts Shotwell may be set by the referee or the Judge of the above-entitled Court and notice thereof given as required by law and that

upon said hearing, that said claim be disallowed and stricken from the records and files of the above-entitled matter.

Dated: March 15, 1958.

/s/ FRANK D. BETTENCOURT.

CHADEAYNE & WILKINSON,

By /s/ J. KINGSLEY CHADEAYNE,
Attorneys for Frank D. Bettencourt.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 17, 1958.

[Title of District Court and Cause.]

DECISION AND ORDER DENYING CLAIM OF BERTHA WATTS SHOTWELL

The claimant, Bertha May Shotwell, filed a claim against the above estate for $10,000.00 for money loaned to the above debtor. Two creditors, Frank D. Bettencourt and Mr. and Mrs. Joseph Jacinto, through their attorneys, filed objections to the claim on the ground (1) that the claim was barred by the provisions of Section 339(1) of the Code of Civil Procedure of California and (2) that the claim was invalid under Section 1624(1) of the Civil Code of California, (Statute of Frauds).

The Facts

The facts were as follows: On or about May 21st, 1955, Mr. and Mrs. Duncan of the debtor partnership, borrowed the sum of $10,000 from Mrs Duncan's mother, Bertha May Shotwell, and received the money by a check dated May 17th, 1955 drawn on the Manteca Branch of the Bank of America, payable to Mrs. Wm. Duncan for $10,000 and Bertha May Shotwell signed the check as maker. Mrs. Wm. Duncan endorsed the check and it is noted on the back as deposited in the account of Wm. Duncan & Sons.

Mr. and Mrs. Duncan testified that they borrowed the $10,000 from Bertha May Shotwell, Mrs. Duncan's mother, for the purpose of buying cattle and feed for the partnership and agreed to pay back the loan to Mrs. Shotwell in installments after the prior F.H.O.A. loan should be paid off by monthly installments of $325.00. Mrs. Shotwell was to be paid the same amount of monthly installments after that loan to F.H.O.A. had been paid, which they both testified would not be until 1959 or 1960. They testified that they gave no note or anything in writing in regard to the transaction. The transaction was entirely oral.

The loan was made and the check dated May 17th, 1955. The Petition for Arrangement in this proceeding was filed July 30th, 1957, more than two years later, and the claim was filed on January 30th, 1958.

Claimant's Argument

Counsel for the claimant argues (1) that the check was evidence in writing of the loan; (2) that since the loan was not to be repaid until after the F.H.O.A. loan was paid in 1959 or 1960, the cause of action would not accrue until then and the two year limitation would not commence to run until then, and; (3) that the oral agreement could have been paid off within one year and would, therefore, not be within the Statute of Frauds.

Conclusion

There is no dispute that all of the transactions in connection with the loan and the check to indicate that it was a loan or any written notation from which a promise to pay that amount to Mrs Shotwell can be shown. As shown by the case cited by Nels B. Fransen, attorney for the claimant, the Courts of California have been very liberal in allowing practically any writing from which a promise to pay can be drawn, to take the case out of the two year Statute of Limitations. A mere notation of "loan" on a check which was given to the borrower by the lender has been held sufficient. (Tazola vs. DeRita, (1955) 45 Cal. 2d 1; 285P 2d 897). Under the cases cited by J. Kingsley Chadeayne, attorney for Frank D. Bettencourt, the objector, a receipt or check in or of itself is not a sufficient written memorandum of a loan to the payee or a promise by the payee of the check to pay the maker. (Ashley vs. Vischer, 24 Cal. 322); (Garcia vs. Sainz, 59 C.A. 246; 210 P 534).

In this case, there is nothing whatever on the check from which a contract, promise or memorandum showing it was a loan and the money was to be repaid can be derived. The evidence of the loan rests entirely upon oral testimony.

The oral evidence was to the effect that the payments on the loan were not to start until the prior F.H.O.A. loan had been paid off in installments of $325.00 per month which would be sometime in 1959 or 1960 and thereafter the payments at the rate of $325.00 per month would be made to Mrs. Shotwell. Under Section 312 of the Code of Civil Procedure of California the claimant could only commence an action on the obligation within the period of two years prescribed in Section 339 CCP after "the cause of action shall have accrued", that is, sometime in 1959 or 1960, so that Section 339(1) would not apply to the matter before us.

Since the oral testimony was clearly to the effect that Mrs. Shotwell was not to be paid until the F.H.O.A. loan had been paid sometime in 1959 or 1960, the oral agreement was "by its terms not to be performed within a year of the making thereof", and was therefore "invalid" under Section 1624(1) of the Civil Code.

It is unfortunate that the elderly claimant did not have some evidence in writing of the loan.

It is, Therefore, Ordered that the claim of Bertha May Shotwell be, and it hereby is, denied and re-

jected because it is invalid under Section 1624(1) of the Civil Code of California because there was no note or memorandum thereof in writing subscribed by the party to be charged or by his agent.

Dated: June 4th, 1958.

/s/ EVAN J. HUGHES,
Referee in Bankruptcy.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Hon. Evan J. Hughes, Referee in Bankruptcy:

The petition of Bertha Watts Shotwell, creditor in the proceedings for arrangement under Chapter XI, respectfully represents:

I.

The petitioner is a creditor in the sum of Ten Thousand ($10,000.00) Dollars of William Duncan & Son, a co-partnership consisting of Bernice Bertha Duncan, Archer Edgar Duncan and Mary Patricia Duncan and William Walter Duncan, and has filed a claim in these proceedings for the sum of Ten Thousand ($10,000.00) Dollars; that two creditors, Frank D. Bettencourt and Mrs. Joseph Jacinto, through their attorneys, filed Objections to the petitioner's claim.

II.

That on June 4, 1958, your Honor entered an Order herein denying the claim of this petitioner in the above-mentioned matter, which said Order was based upon a finding that said claim was invalid under Section 1624(1) of the Civil Code of California because there was no note or memorandum thereof in writing subscribed by the party to be charged or by his agent.

III.

That the said finding and the Order are erroneous in that the Honorable Referee committed an error of law in failing to apply the Doctrine of Full Performance as asserted by the petitioner in her briefs as eliminating the necessity of a writing under Section 1624 Sub.(1), Civil Code of California (Statute of Frauds).

Wherefore, petitioner prays that your Honor certify to the Judge of this Court and transmit to the Clerk the record of said proceedings having to do with, or in any manner bearing upon, the Order aforesaid, as provided in Section 39 of the Bankruptcy Act.

/s/ BERTHA WATTS SHOTWELL.

NELS B. FRANSEN and
PETER J. SIMONELLI,
Attorneys for Petitioner,

By /s/ PETER J. SIMONELLI.

Duly verified.

[Endorsed]: Filed June 12, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON REVIEW TO THE JUDGE OF THE U. S. DISTRICT COURT

To: Honorable Sherrill Halbert, Judge of the United States District Court for the Northern District of California:

I, Evan J. Hughes, Referee in Bankruptcy in charge of this proceeding, do hereby certify that in the course of the administration of said matter, two creditors, Frank D. Bettencourt, and Mr. and Mrs. Joseph Jacinto, filed objections to the claim of Bertha May Shotwell for $10,000.00 for money loaned to the debtors, on the grounds: (1st) that the claim was barred by the provisions of Section 339 (1) of the Code of Civil Procedure of California (two year Statute of Limitation); and (2nd) that the claim was invalid under Section 1624 (1) of the Civil Code of California (Statute of Frauds) providing that the agreement "by its terms was not to be performed within a year from the making thereof".

The Facts

The facts were as follows:

On or about May 17, 1955, Mr. & Mrs. Duncan of the debtor partnership, borrowed the sum of $10,000 from Mrs. Duncan's mother, Bertha May Shotwell, and received the money by a check dated May 17th, 1955, drawn on the Manteca Branch of

the Bank of America, payable to Mrs. Wm. Duncan for $10,000 and Bertha May Shotwell signed the check as maker. (Claimant's Exhibit 1) Mrs. Wm. Duncan endorsed the check and it is noted on the back as deposited in the account of Wm. Duncan and Sons.

Mr. and Mrs. Duncan testified that they borrowed the $10,000 from Bertha May Shotwell, Mrs. Duncan's mother, for the purpose of buying cattle and feed for the partnership and agreed to pay back the loan to Mrs. Shotwell in installments after the prior F.H.O.A. loan should be paid off by monthly installments of $325.00. Mrs. Shotwell was to be paid the same amount of monthly installments commencing after that loan to F.H.O.A. had been paid, which they both testified would not be until 1959 or 1960. They testified that they signed no note or anything in writing in regard to the transaction. The transaction was entirely oral.

The loan was made and the check dated on May 17th, 1955. The Petition for Arrangement in this proceeding was filed July 30th, 1957, more than two years later, and the claim was filed on January 30th, 1958. The claimant, Bertha May Shotwell, an elderly woman, did not testify.

Claimant's Argument

Counsel for the claimant argue (1) that the check was evidence in writing of the loan; (2) that since the loan was not to be repaid until after the F.H.O.A. loan was paid in 1959 or 1960, the cause

of action would not accrue until then and the two year limitation would not commence to run until then; (3) that the oral agreement could have been paid off within one year and would, therefore, not be within the Statute of Frauds; and (4) that the advance of the money was "full performance" and would take the case out of the Statute of Frauds.

Conclusion

There is no dispute in the evidence as to the transaction and that all of the dealings in connection with the loan, except the check itself, were oral. The Referee held that since the oral testimony was that the installment payments to Mrs. Shotwell were not to commence until after the prior government loan should be paid off in monthly installments of $325.00, which would be sometime in 1959 or 1960, that under Section 312 of the Code of Civil Procedure of California no action could have been commenced by Mrs. Shotwell until after the government loan was paid off in 1959 or 1960 and the cause of action would not accrue and the running of the Statute of Limitations would not commence until after the F.H.O.A loan should be paid off in 1959 or 1960 and therefore, the claim was not barred by the Statute of Limitations. From that ruling there is no review asked.

The Referee decided that since by the oral terms of the loan, the payments were not to commence until after the government loan should be paid off sometime in 1959 or 1960, the contract was not to

be performed within a year from the making thereof and was, therefore, invalid under Section 1624 (1) of the Civil Code of California.

The applicable provisions of Section 1624 are as follows:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:
>
> "(1) An agreement that by its terms is not to be performed within a year from the making thereof."

As to the claimant's argument that the advance of the money by Mrs. Shotwell was a "full performance" on her part, there seems to be no recorded decision in California to that effect. Most of the cases holding that full or partial performance of his promise by one party will take the case out of the statute in order to prevent hardship or injustice, are cases of employment, where the worker has performed his part by doing the work, or land cases where money is paid or improvements made relying on the oral contract. The cases cited gave relief to claimants who sued on causes of action based on "Quantum meruit" "assumpsit", implied promise to pay or unjust enrichment, and not on the oral contract which would be invalid under the statute of frauds. If claimant had filed her claim in this proceeding on one of such common law causes of action, it would then be barred by the two-year statute of

limitation. It was the oral agreement of the debtors to start paying more than two years later that saved the original oral contract from being barred by the two year Statute of Limitation.

The reasoning of the Referee and the authorities cited are set forth in the Opinion and Order of the Referee accompanying this Certificate.

Accompanying this Certificate are the following papers for the information of the Judge:

1. The Petition for Review of the claimant, Bertha Mae Shotwell;
2. The Decision and Order of the Referee holding that the claim is invalid under Section 1624(1) of the Civil Code of California and denying the claim;
3. The check dated May 17, 1955, of Mrs. Shotwell for $10,000 (Exhibit 1, photostat);
4. The original claim of Mrs. Shotwell;
5. The Objections of Frank D. Bettencourt and Mr. and Mrs. Joseph Jacinto to the claim;
6. The briefs of the respective parties;
7. A transcript of the testimony prepared by the court reporter.

Dated: August 5th, 1958.

Respectfully Submitted,

/s/ EVAN S. HUGHES,
Referee in Bankruptcy.

[Endorsed]: Filed August 5, 1958.

[Title of District Court and Cause.]

NOTICE OF FILING OF CERTIFICATE OF REFEREE ON REVIEW AND OF HEARING

To: CHADEAYNE & WILKINSON,
Attorneys at Law,
37 West 10th Street,
Tracy, California;

NELS B. FRANSEN &
PETER J. SIMONELLI,
Attorneys at Law,
1106 North El Dorado Street,
Stockton, California;

CARDOZO, TRIMBUR & NICKERSON,
Attorneys at Law,
812-13th Street,
Modesto, California.

You Will Please Take Notice: That the Certificate of Referee on Review to the Judge of the United States District Court from an order of the Referee denying the claim of Bertha May Shotwell, has been filed this 5th day of August, 1958, with the Clerk of the United States District Court, and you have ten (10) days from said date of filing within which to file exceptions thereto and said Certificate and Report will be on the calendar of the Judge of the United States District Court for argument and hearing on Monday, August 18th, 1958, at ten o'clock a.m. in the U. S. District Court Room No. 1, Fourth floor, Post Office Building, 8th & I Streets, Sacramento, California.

Dated: August 5th, 1958.

/s/ EVAN J. HUGHES,
Referee in Bankruptcy.

[Endorsed]: Filed August 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Mrs. Bertha Watts Shotwell, a petitioning creditor in this matter, has filed a petition to review the order of the referee in bankruptcy denying her claim. She is the mother of Mrs. William Duncan,[1] and filed a proof of claim on February 7, 1958, alleging that the debtor, William Duncan & Son, was indebted to her in the amount of ten thousand dollars ($10,000).

After a hearing, the referee in bankruptcy denied Mrs. Shotwell's claim, and concluded as follows:

> "The facts were as follows: On or about May 21st, 1955, Mr. and Mrs. Duncan of the debtor partnership, borrowed the sum of $10,000 from Mrs. Duncan's mother, Bertha May Shotwell,[2] and received the money by a check dated May 17th, 1955, drawn on the Manteca Branch of the Bank of America, payable to Mrs. Wm. Duncan for $10,000 and Bertha May Shotwell signed as

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[1]Also known as Bernice Bertha Duncan.

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[2]Also known as Bertha Watts Shotwell.

maker.[3] Mrs. William Duncan endorsed the check and it is noted on the back as deposited in the account of Wm. Duncan and Sons.

"Mr. and Mrs. Duncan testified that they borrowed the $10,000 from Bertha May Shotwell, Mrs. Duncan's mother, for the purpose of buying cattle and feed for the partnership and agreed to pay back the loan after the prior FHOA loan should be paid off by monthly installments of $325.00. Mrs. Shotwell was to be paid the same amount of monthly installments after the loan to FHOA had been paid, which they both testified will not be until 1959 or 1960. They testified that they gave no note or anything in writing in regard to the transaction. The transaction was entirely oral.

"The loan was made and the check dated May 17, 1955. The petition for arrangement in this proceeding was filed July 30th, 1957, more than two years later, and the claim was filed on January 30th, 1958."

Other creditors objected to the proof of this claim, and two arguments were proposed in opposition to Mrs. Shotwell's claim. The first was that the claim was barred by the applicable Statute of Limi-

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[3]Although the referee in bankruptcy here states that Mrs. Shotwell signed the instrument as "maker," there is no suggestion that he found the instrument to be anything other than a bill of exchange, or ordinary bank check.

tations, which foreclosed the commencement of an action upon an oral contract after a period of two years had passed from the accrual of the cause of action.[4] The second was that the contract was invalid under the provisions of the Statute of Frauds,[5] in that this was an oral agreement which, by its terms, could not be performed within a year.

It is a basic rule in bankruptcy proceedings that the validity of the obligations of the bankrupt are to be determined by the law of the state wherein the court of bankruptcy is located. See: 2 Remington on Bankruptcy § 954. Another basic rule is that the trustee in bankruptcy is specifically authorized to make all objections to any claim which could have been made by the bankrupt himself;[6] also, should the trustee not make an appropriate objection, any creditor may raise his objection to the proof of a claim.[7] Accordingly, the objections were properly raised, and the questions of law are to be determined by the law of the State of California.

Considering the first contention of the objecting creditors, that the obligation was barred by the Statute of Limitations, the referee properly rejected the argument. Although it is true that the

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[4]California Code of Civil Procedure, Section 339.

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[5]California Civil Code, Section 1624(1).

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[6]Bankruptcy Act §70(c).

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[7]Bankruptcy Act §57(d).

statute states that two years is the period of limitation for the commencement of an action upon an oral contract, it is equally true that the statute does not commence to run until the cause of action accrues. The introductory statute to the general section dealing with the limitation of actions states:

> "Civil Actions, without exception, can only be commenced within the periods prescribed by this title, after the cause of action shall have accrued * * *"
>
> California Code of Civil Procedure, Section 312.

It is obvious that inasmuch as the first payment of the petitioning debtors was not to have been made until some time in 1959 or 1960, the Statute of Limitations could not be called into play until some two years after the time of the due date of the first payment.

However, in rejecting the claim of Mrs. Shotwell, the referee in bankruptcy relied upon the Statute of Frauds. He states:

> "Since the oral testimony was clearly to the effect that Mrs. Shotwell was not to be paid until the FHOA loan had been paid some time in 1959 or 1960, the oral agreement was 'by its terms not to be performed within a year of the making thereof,' and was therefore 'invalid' under Section 1624(1) of the Civil Code."

Looking first into the nature of the claim of the petitioning creditors, it is noticed that the referee found as a matter of fact that there was a loan made by Mrs. Shotwell. A loan, as defined by the Supreme Court of California, is:

> "* * * the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties of the transaction will be deemed a loan regardless of its form."

Milans v. Credit Discount Co., 27 C. 2d 335, 339, 163 P. 2d 869, 165 A.L.R. 621.

According to the facts as found by the referee, Mrs. Shotwell did lend $10,000 to William Duncan & Son. Her side of the contract was performed completely; there was nothing left for her to do; her part of the agreement was fully executed.

It is the law of California that where a contract has been completely executed on one side, and there is nothing left to do but make the payment of consideration, the agreement is no longer within the Statute of Frauds.

> "* * * But whenever a contract within the purview of the statute has been so far executed that nothing remains to be done but to pay the consideration, the fact that payment of the consideration is not required by the provisions of the contract to be made within a

year furnishes no defense to an action for such payment."

23 Cal. Jur. 2d 401.

Such appears to be the rule of the great weight of authority according to Professors Williston and Corbin in their treatises. 2 Williston on Contracts § 504, p. 1470; 2 Corbin on Contracts § 454, p. 573. The rule of the Restatement is:

> "Where any of the promises in a bilateral contract cannot be fully performed within a year from the time of the formation of the contract, all promises in the contract are within Class V of § 178,[8] unless and until one party to such a contract completely performs what he has promised. When there has been such complete performance, none of the promises in the contract is within Class V."

Restatement of the Law of Contracts § 198.

The referee in bankruptcy, in certifying this matter for review, has stated:

> "As to the claimant's argument that the advance of the money by Mrs. Shotwell was a 'full performance' on her part, there seems to be no recorded decision in California to that effect. Most of the cases holding that full or partial performance of his promise by one party will take the case out of the statute in

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[8]Referring to the classes of contracts within the Statute of Frauds.

> order to prevent hardship or injustice, are cases of employment, where the worker has performed his part by doing the work, or land cases where money is paid or improvements made relying on the oral contract. The cases cited gave relief to claimants who sued on causes of action based on 'quantum meruit,' 'assumpsit,' implied promise to pay or unjust enrichment, and not on the oral contract which would be invalid under the statute of frauds."

Although there may have been other remedies available to the petitioning creditor, it is the opinion of the Court that she was correct in relying on the contract when she presented her claim.

> "The statute of frauds does not apply where there has been a full and complete performance of an oral contract by one of the parties to it; and such party is not relegated to his suit in equity or on the quantum meruit, but may sue on the contract in a court of law, particularly where the agreement has been completely performed as to the part thereof which comes within the statute."

37 Corpus Juris Secundum 762, Statute of Frauds, Section 251.

Since there appear to be no reported decisions of the California courts passing on the precise factual situation here presented, it is the duty of this Court to determine what the California courts would decide when the question was presented.

The California courts have held that the Statute of Frauds did not apply in cases of contracts executed on one side in situations dealing with employment contracts, Roberts v. Wachter, 104 C.A.2d 271, 231 P.2d 534; Dean v. Davis, 73 C.A.2d 166, 166 P.2d 15; an agreement between real estate brokers for the payment of commissions, Hellings v. Wright, 29 C.A. 649, 156 P. 365; an agreement involving the procurement of an oil lease, Dutton v. Interstate Investment Corp., 19 C.2d 65, 119 P.2d 138; and an action for the commission on sales made under a concession contract, Bergin v. vander Steen, 107 C.A.2d 8, 236 P.2d 613.

A different view is suggested in Hall v. Puente Oil Co., 47 C.A. 611, 191 P. 39. There, however, the statement of the California District Court of Appeals appears to be dictum. The appellate court declined to find any agreement upon which a decision could be based, stating:

> "* * * the evidence touching the question is too vague and uncertain upon which to base a contract of such character." 47 C.A. at 616.

Such is not the case here, where the referee found that there existed a definite contract, and that there was no uncertainty concerning its terms.

The latest statement of the rule by the California courts seems to be found in Bergin v. van der Steen, supra, where the court said at page 18:

> "There is no merit in appellant Anderson's argument that respondent's claim is barred by

> the statute of frauds in that it comes within section 1624(1) of the Civil Code, the one-year section. The answer to this contention is that Bergin has completely performed his promises under the 1940 contract, having assigned his rights under the original agreement and having thereafter refrained from bidding for concession privileges at the end of the 1941 season. Such agreement is thereby taken out of the operation of the statute. ((Dutton v. Interstate Inv. Corp., 19 Cal. 2d 65, 70 [119 P.2d 138]; Rest. Contracts, § 198.)"

The referee has concluded that this rule cannot be applied to an oral contract for the repayment of money loaned. This Court believes that the better view is that the rule is applicable to such a contract because the purpose of the rule is to prevent unjust enrichment by one party to a contract when the other party already has fully performed his obligation under the contract. This Court is persuaded that the California courts would find this reason to be more impelling in the case of the contract to repay money loaned, than in the decided cases concerning oral contracts for employment, commissions, real estate transactions, et cetera. It is difficult to imagine a more complete performance on one side of a contract than the loaning of money by one party, leaving only repayment by the other party. Under this view the claim of the petitioning creditor is not barred by the Statute of Frauds.

Consequently, inasmuch as the Statute of Frauds

is not a proper defense to a contract which has been fully executed on one side, where there is no performance required other than the payment of consideration, the decision of the referee in bankruptcy must be reversed.

Accordingly, it is the order of the Court that the holding of the referee in bankruptcy be reversed, and that the matter be, and the same hereby is remanded for further proceedings not inconsistent with the foregoing views and opinions herein expressed.

Dated: August 25, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed August 25, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Frank D. Bettencourt and Joe R. Jacinto and Violet Jacinto, his wife, creditor-objectors to claim of Bertha Watts Shotwell, appeal to the United States Court of Appeals for the Ninth Circuit from order made and entered in the above-entitled matter on the 25th day of August in the United States District Court for the Northern District of California, allowing claim of Bertha Watts Shotwell over the objections of

said Frank D. Bettencourt and Joe R. Jacinto and Violet Jacinto.

Dated: September 22, 1958.

CHADEAYNE & WILKINSON,
Attorneys for Frank D. Bettencourt;

CARDOZA, TRIMBUR & NICKERSON,
Attorneys for Joe R. Jacinto and Violet Jacinto;

By /s/ J. KINGSLEY CHADEAYNE.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 75 (d) of the Rules of Civil Procedure, the creditor-objector-appellants hereby state the points on which they intend to rely on their appeal from Order entered herein August 25, 1958, as follows:

1. That the oral loan and agreement for repayment thereof, the basis of claim of Bertha Watts Shotwell, as found by the Referee and the Judge of the District Court was void under the provisions of Section 1624, Subd. 1, Civil Code of the State of California, in that it was an agreement that by its

terms was not to be performed within a year from its making thereof, and was required to be in writing, and;

2. That the Judge of the District Court erred in holding that the doctrine of "full and complete performance" applied to the facts as found so as to avoid the effect of Section 1624, Subd. 1, Civil Code of the State of California.

CHADEAYNE & WILKINSON,
Attorneys for Frank D. Bettencourt;

CARDOZA, TRIMBUR & NICKERSON,
Attorneys for Joe R. Jacinto and Violet Jacinto;

By /s/ J. KINGSLEY CHADEAYNE.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled

case, and that they constitute the record on appeal herein as designated by the appellant.

Proof of claim by individual Bertha Watts Shotwell.

Objection to claim of Bertha Watts Shotwell.

Decision and order denying claim of Bertha Watts Shotwell.

Petition for review.

Certificate of Referee on review to the Judge of the U. S. District Court.

Notice of filing of certificates of Referee on review and of hearing.

Memorandum & Order of the District Court.

Notice of Appeal.

Cost Bond on Appeal.

Statement of points on appeal.

Appellants' designation of contents of record on appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 29th day of October, 1958.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 16248. United States Court of Appeals for the Ninth Circuit. Frank D. Bettencourt, Joe R. Jacinto and Violet Jacinto, Appellants, vs Bertha Watts Shotwell, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: November 3, 1958.

Docketed: November 14, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.